



HM Government

Review of the Balance of Competences between the United Kingdom and the European Union Subsidiarity and Proportionality

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Subsidiarity and Proportionality

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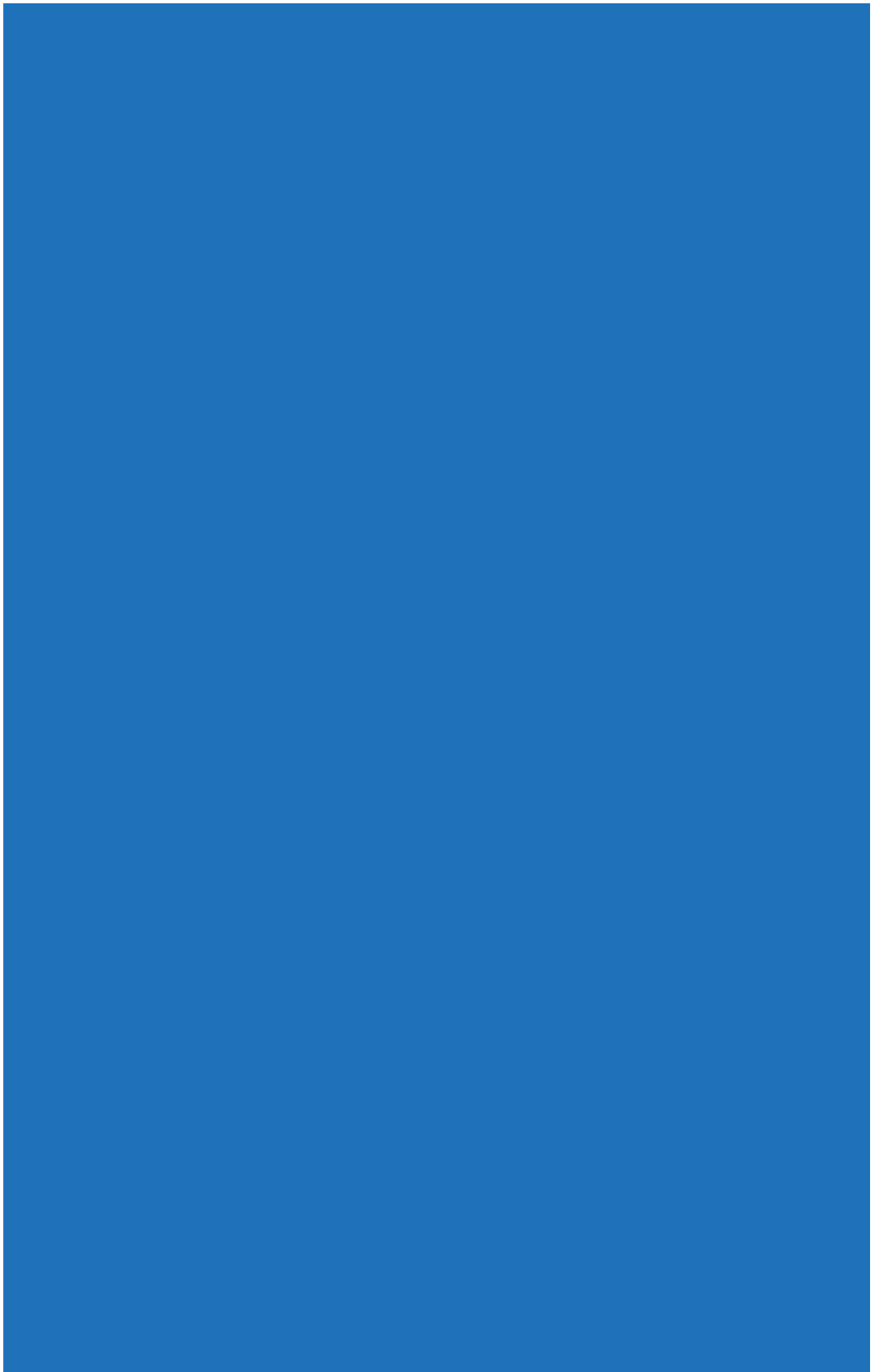
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Executive Summary

This report examines how the principles of subsidiarity and proportionality apply in areas of European Union action and is led by the Foreign and Commonwealth Office. This report is primarily about how and when competences are exercised, and by whom. It is a reflection and analysis of the evidence submitted by experts, non-governmental organisations, businesspeople, Members of Parliament and other interested parties, either in writing or orally, as well as a literature review of relevant material and other Balance of Competences reports. Where appropriate, the report sets out the current position agreed within the Coalition Government for handling this policy area in the EU. It does not predetermine or prejudge proposals that either Coalition party may make in the future for changes to the EU or about the appropriate balance of competences. This report examines two general principles of EU law, and one specific article:

- Subsidiarity is a principle which governs the choice of who should act, in situations where potentially more than one actor is able to act. In the EU context, it refers to the choice of whether to act at EU, national or sub-national levels, with a preference for the level closest to citizens. A review conducted by the Dutch Government concluded that subsidiarity could be summed up as ‘Europe where necessary, national where possible’¹
- Proportionality requires that action be no more than is needed to achieve the intended objective. This means that the need for action, and the costs and benefits that can be expected must be examined.
- Article 352 of the Treaty on the Functioning of the European Union (TFEU) is sometimes known as the flexibility clause. This provision provides a legal basis on which EU legislation can be proposed, subject to unanimity in the Council and the approval of the European Parliament, to achieve an EU objective when no other specific legal basis is available. Its use is subject to a number of restrictions.

Evidence throughout the Balance of Competences Review has considered EU competence in light of the principles of subsidiarity and proportionality, and therefore most of the Balance of Competences reports contain relevant examples and analysis on the application of these two principles. Some respondents cited cases where, while in their view the balance of competences was appropriate, they felt EU proposals or laws would have been better at the national or devolved/local level (subsidiarity) or which had disproportionate costs to the expected benefits (proportionality). For example, evidence to the Environment and Climate

¹ Government of the Netherlands, *Europe Where Necessary, National Where Possible* (2013).

Change report highlighted the considerable debate on how far environment and climate change competence should extend and whether the EU always acted in accordance with the principles of subsidiarity in a way which is compatible with the principle of localism. In addition, evidence was also received which considered the proposal to ban the use of reusable olive oil jugs in restaurants to be disproportionate and a draft directive on occupational pension schemes to be a breach of subsidiarity, because no evidence was given that there was an EU-wide problem requiring an EU-wide solution. However, there was also recognition in evidence received that some issues, such as cross-border environmental problems or the Single Market, justified EU level action, and examples were given of measures considered to be proportionate.

There was considerable evidence around the role of national parliaments, as well as other actors, in ensuring respect for subsidiarity and proportionality within the EU. Existing mechanisms allowing national parliaments to express their opinions on legislative proposals were generally welcomed. The majority of respondents argued that these could be strengthened further to improve decision-making and to increase the EU's democratic legitimacy, pointing to the higher turnout typically experienced in national as opposed to European Parliament elections. There were other contributors who argued that this could complicate action and emphasised the role national parliaments already play through parliamentary scrutiny of Member State governments' EU policies.

The Report is divided into three chapters.

Chapter One sets out the historic development of subsidiarity and proportionality as general principles of EU law. It explores their similarities and the differences in the mechanisms available, including for national parliaments, to ensure their effective application. There is also consideration of Article 352 of the Treaty on the Functioning of the European Union (TFEU), which was used extensively in the 1970s and 1980s but is now subject to a number of procedural and substantive restrictions. In the case of the UK, use of Article 352 requires the approval of an Act of Parliament.

Chapter Two examines the current state of application of these principles and the range of views about their operation. In general, respondents expressed support for the principles as part of the system of checks and balances in the EU. Some contributors saw subsidiarity as a means of protecting national governments' and parliaments' powers, and as a mechanism to keep decision-making close to citizens. Others thought that it was a means of ensuring efficient and effective regulation by requiring proper consideration of the pros and cons of different levels for action. Evidence touched on the tension between democratic legitimacy, which means decisions taken closer to citizens, and efficiency, which may be best served by uniform measures at the EU level or globally. The evidence demonstrated broad support for the principle of proportionality, and it was seen as a key element of better regulation.

The evidence also questioned the extent to which these principles are, and should be, subject to both judicial and political control. National parliaments' ability to give reasoned opinions on legislative proposals does not expressly relate to proportionality, only subsidiarity. However, there are opportunities for the EU institutions and national governments to question the proportionality and subsidiarity of a measure throughout the pre-legislative drafting and negotiation process. National parliaments can also consider proportionality and subsidiarity through their parliamentary scrutiny. Some respondents considered that subsidiarity was essentially a political question, and therefore best protected by political actors, such as national parliaments, as well as Member State governments. Others argued that national parliaments should also have the right to challenge proposals on grounds of proportionality, partly to give greater democratic legitimacy to the EU and partly because application involved political choices as well as technical assessment. Some would like to see the European Court of Justice (ECJ) playing a bigger role

in upholding subsidiarity, pointing to the fact that it has sometimes struck down EU and national measures for violating the principle of proportionality, but has never explicitly done so for breach of subsidiarity.

Some respondents were deeply critical of the implementation of the principles in practice, and there was a broad consensus around the considerable room for improvement. Examples were given of EU action considered to be unnecessary, overly harmonising or resulting in disproportionate costs to small business or governments (national or local). This was a theme in other reports. For example, the Federation of Small Businesses, in response to the Environment and Climate Change report, stressed that the focus should be on ensuring that SMEs could interact with a streamlined and responsive planning and development system, rather than revising directives such as the Environmental Impact Assessment Directive, which they believed would have serious consequences for the UK's small firms. Others drew attention to some of the mechanisms brought in by the Lisbon Treaty, and what they considered a recent improvement in culture in the Commission to reduce the burden of EU legislation. A number of respondents emphasised the importance of Commission impact assessments to ensure a sound evidence base on the need for action in the first place and to test whether a proposal is proportionate and in line with subsidiarity. Several suggestions were offered to improve the rigour and independence of these impact assessments, including greater use of qualitative and quantitative indicators, wider consultation and the use of independent experts on the impact assessment board. Some also advocated the opportunity to scrutinise draft legislation at a later stage in the legislative process, as proposals may change significantly through the process. Respondents highlighted the need to assess the cumulative effect of regulations to ensure that they do not constitute a disproportionate overall burden on business or local government, and some evidence also pointed to concerns about the lack of scrutiny of detailed technical rules which could also impose very significant costs.

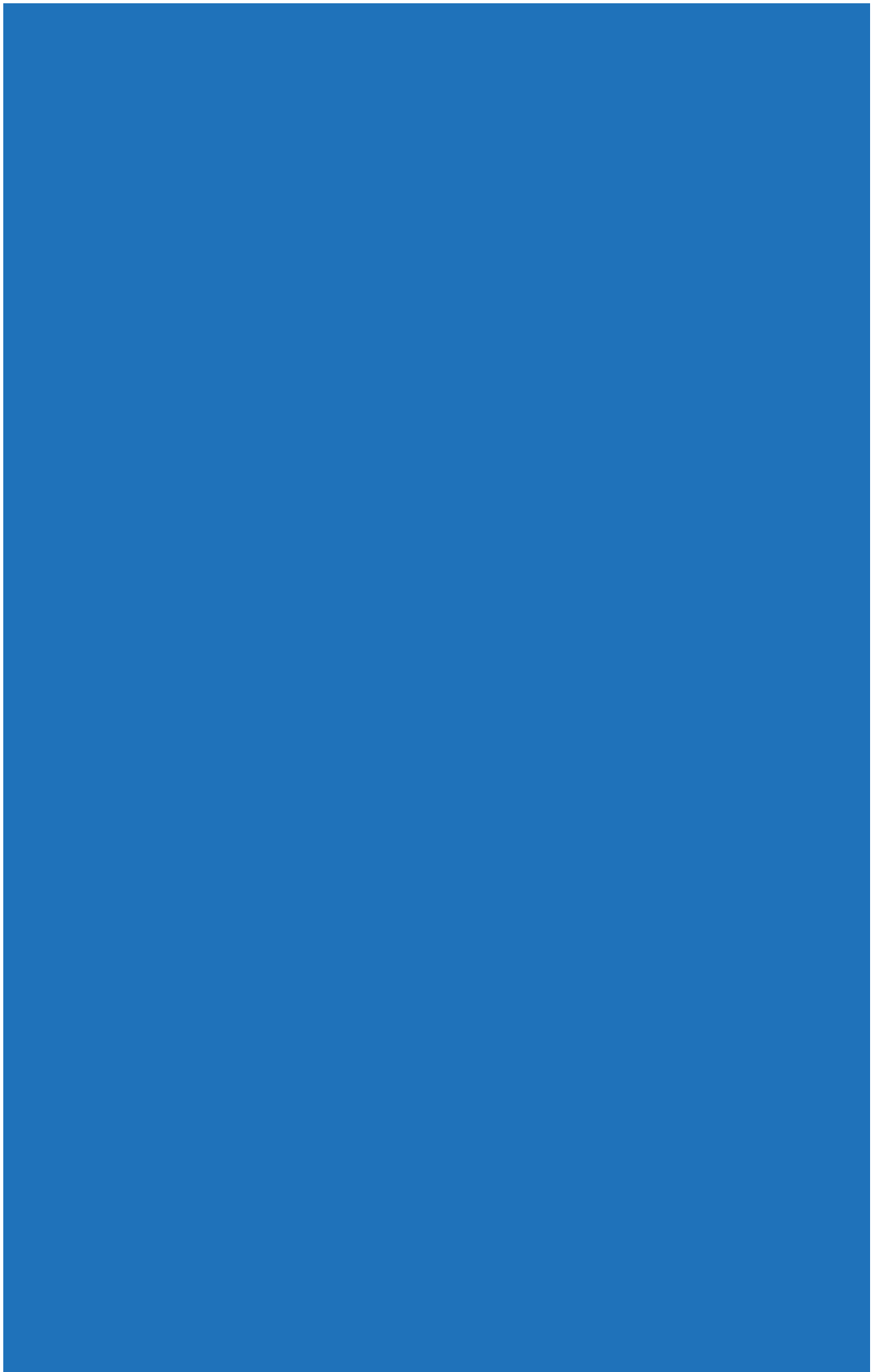
There was limited evidence received on Article 352. Article 352 was generally considered to be necessary, as were stringent safeguards to avoid it being overused or going beyond the Treaties. It was suggested that other Member States might want to emulate the type of parliamentary controls found in the UK and German systems, which require parliamentary approval of any legislation using the flexibility clause.

Chapter Three looks at the current debate and focuses primarily on subsidiarity. It examines the related broader questions such as how to enhance the democratic legitimacy of the EU, increase the influence of national parliaments in EU processes and improve the quality of EU regulation.

Respondents offered a number of suggestions to enhance existing mechanisms for national parliaments, including: earlier engagement with the EU and the right to propose areas for legislation; allowing parliaments explicitly to raise concerns over areas other than subsidiarity, such as proportionality, legal base and human rights; providing national parliaments more time to consider proposals; giving groups of national parliaments the right to block proposals, unless they are significantly amended; allowing national parliaments to raise concerns at a later stage in the legislative process; lowering the threshold for national parliaments to get the Commission to reconsider a proposal; and the power to instigate reviews of existing legislation to examine whether it is still appropriate at EU level and proportionate. Other suggestions included giving national parliaments the right to disapply EU legislation, or requiring prior approval of a number of national parliaments before a proposal could be taken forward. There were also some suggestions for institutional changes, such as an EU body which would bring together national parliaments.

These issues have been the focus of much of the UK Government's EU reform agenda in recent years. The Government has set out areas where it believes improvement is necessary to increase respect for both subsidiarity and proportionality – in order to support greater European competitiveness, and to maintain the consent of citizens in an expanded and increasingly diverse EU.

The new European Commission took office on 1 November 2014, with a number of structural changes including the creation of a First Vice-President role with particular responsibility for considering respect for subsidiarity and proportionality before any new legislative proposals are tabled. This suggests that there will be further opportunities to discuss these issues with the 2014-2019 Commission.



Introduction

Terms of Reference

This report is one of 32 reports produced as part of the Balance of Competences Review. The Foreign Secretary launched the Review in Parliament on 12 July 2012, taking forward the Coalition commitment to examine the balance of competences between the UK and the EU.

It will provide an analysis of what the UK's membership of the EU means for the UK national interest. It aims to deepen public and Parliamentary understanding of the nature of our EU membership and provide a constructive and serious contribution to the national and wider European debate about modernising, reforming and improving the EU in the face of collective challenges. It has not been tasked with producing specific recommendations or looking at alternative models for the UK's overall relationship with the EU.

The review is broken down into a series of reports on specific areas of EU competence, spread over four semesters between 2012 and 2014. There is more information on the review at www.gov.uk/review-of-the-balance-of-competences.

The Nature of this Report

A Call for Evidence was launched on 27 March 2014 and remained open until 30 June 2014. During this period, the Government sought views from a wide range of stakeholders, including other Member States, think-tanks, legal and political science academics, politicians, business groups, policy and legal experts who work with or in the EU institutions, the Devolved Administrations and the general public. This report draws on written evidence submitted, notes of seminars or discussions held during the call for evidence period, and existing material which has been brought to our attention by interested parties, such as past select committee reports or reports of the European Commission. There is a list of evidence submitted in Annex A and a list of engagement events in Annex B. A literature review of relevant material is detailed in Annex C. Given subsidiarity and proportionality are fundamental principles rather than distinct areas of competence, the scope of the report is broad, and assesses the impact of the principles in different policy areas, drawing on evidence submitted to the other 31 reports in this series. For a fuller picture of evidence relating to the application of subsidiarity and proportionality in individual areas of competence, the relevant reports should be read.

EU Competence

For the purposes of this review, we use a broad definition of competence. Put simply, competence in this context is about everything deriving from EU law that affects what happens in the UK. That means examining all the areas where the Treaties give the EU competence to act, including the provisions in the Treaties giving the EU institutions the power to legislate, to adopt non-legislative acts, or to take any other sort of action. But it also means examining areas where the Treaties apply directly to the Member States without needing any further action by the EU institutions.

Subsidiarity and proportionality are two of several checks and balances on the EU's ability to act, which include:

- The principle of conferral – can the EU act? Have Member States given it the power (competence) to do so?;
- The principle of subsidiarity – should the EU act? Or would action better be taken at the national or sub-national level?; and
- The principle of proportionality – if the above tests are met, how should the EU act? It should avoid unnecessary restrictions, and only do what is necessary to achieve its aim.

Contents and Interdependencies

This report covers the principles of subsidiarity and proportionality, as well as the so called 'flexibility clause' (Article 352 TFEU). Many other Balance of Competences reports touch on how these principles and this article (or its predecessor versions) have been applied in practice in different thematic areas.

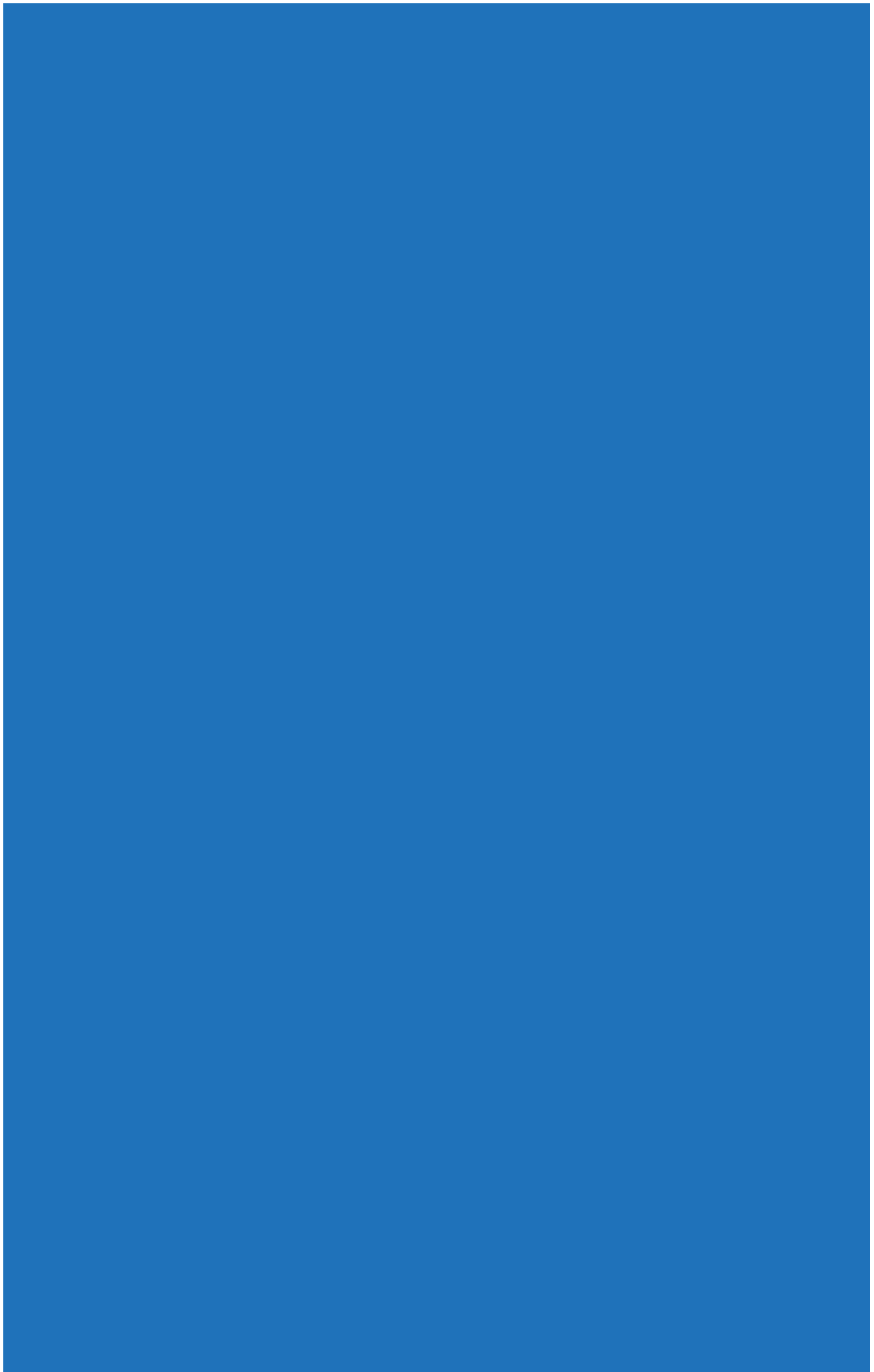
Definition of EU Competence

The EU's competences are set out in the EU Treaties, which provide the basis for any actions the EU institutions take. The EU can only act within the limits of the competences conferred on it by the Treaties, and where the Treaties do not confer competences on the EU they remain with the Member States.

There are different types of competence: exclusive, shared and supporting. Only the EU can act in areas where it has exclusive competence, such as the customs union and common commercial policy. In areas of shared competence, such as the Single Market, environment and energy, either the EU or the Member States may act, but the Member States may be prevented from acting once the EU has done so. In areas of supporting competence, such as culture, tourism and education, both the EU and the Member States may act, but action by the EU does not prevent the Member States from taking action of their own.

The EU must respect the rights and observe the principles set out in the Charter of Fundamental Rights and with the principles of subsidiarity and proportionality. Under the principle of subsidiarity, where the EU does not have exclusive competence it can only act if it is better placed than the Member States to do so because of the scale or effects of the proposed action. Under the principle of proportionality, the content and form of EU action must not exceed what is necessary to achieve the objectives of the EU Treaties. Article 4(1) TFEU makes it clear that where the Treaties confer a competence on the Union and no specific provision is made, it will share competence with the Member States. The Treaty provisions are set out in the table:

Exclusive Competence (Article 3(1) TFEU)	Shared Competence (Article 4(2) TFEU)	Supporting Competence (Article 6 TFEU)
<ul style="list-style-type: none"> • Customs union • Competition policy within the internal market • Monetary policy for euro zone members • Conservation of marine biological resources • Common commercial policy 	<ul style="list-style-type: none"> • Internal market • Social policy • Economic, social and territorial cohesion • Agriculture and fisheries • Environment • Consumer protection • Transport • Trans-European networks • Energy • Area of freedom, security and justice • Common safety concerns in public health matters 	<ul style="list-style-type: none"> • Protection and improvement of human health • Industry • Culture • Tourism • Education, vocational training, youth and sport • Civil protection • Administrative cooperation



Chapter 1: The Historical Development and Current Status of Subsidiarity, Proportionality and the Flexibility Clause

A. Subsidiarity

Introduction

- 1.1 Subsidiarity is not a type of competence, but rather a principle that must be followed by the EU when considering whether or not to exercise competence. The subsidiarity principle sets out that the EU should only act if the objectives of the proposed action cannot be sufficiently met by the Member States, and can be better achieved by the EU. It therefore regulates the exercise of powers at EU level. This principle underpins the balance of competences as, when the EU has competence, there is an important question about whether the EU should exercise that competence or it should be exercised at Member State or sub-national level. Subsidiarity is also considered important for democracy, as it involves a preference for decision making closer to citizens.
- 1.2 The need for a principle to determine the best level for exercise of power is not unique to the EU context. In many policy areas, in many countries, there is often the choice between global, regional, national or local level action, and the need to weigh up the pros and cons of each, which often relate to a tension between efficiency or simplicity on the one hand, and the need to respect local variations and be responsive to voters on the other. Past decades have seen both increasing globalisation and regional integration, and changes in the allocation of power domestically, whether through greater centralisation or devolution of power. In many countries, allocation of power to different levels is set out in written constitutions, with the courts being available to police the dividing lines. The UK has a strong tradition of parliamentary sovereignty, that is to say, Parliament is the supreme legal authority. Its constitutional arrangements differ significantly from those found in many other EU Member States, which typically have single written constitutions. There have been considerable changes to the constitution in the UK in recent years, including through the devolution of substantial powers to Scotland, Wales and Northern Ireland. Subsidiarity in the EU, the choice between the EU, national or subnational levels, is therefore a subset of an even broader issue, as the same choice exists internationally; the choice of action at global, regional or national level and within nation states, the choice of action at national or a range of subnational levels.
- 1.3 In most areas of EU law, there is a choice to be made about which actor – the EU, the Member States, or local/regional actors – should act, where potentially more than one could do so. Subsidiarity is the principle which governs this choice. It has developed over time with provisions in different EU treaties, reflecting practice and in response to different challenges.

- 1.4 The subsidiarity principle in its current form only applies in areas of non-exclusive EU competence. If the EU has exclusive competence, the argument goes, then the EU is the only actor empowered to act, and it should therefore only consider whether or not to act.
- 1.5 Whilst it is a ‘legal’ principle, in the sense that the EU institutions are legally bound to apply it, putting it into practice requires significant political judgement and compromise. The Treaties’ definition of subsidiarity is high-level and general. Different decision-makers will be influenced by diverse political views, national cultures and constitutional orders when judging which actor – an EU institution, the Member States, or subnational authorities – is best placed to achieve an objective.¹

Historical Development of Subsidiarity

- 1.6 Subsidiarity is a broad concept with historical origins that long predate the existence of the EU. Consequently, understandings and interpretations of its meaning vary. For example, it is a central tenet of Catholic social thought which holds that nothing should be done by a large and complex organisation that could be done better by a smaller and simpler organisation. The logic behind this is that for reasons of democracy and justice, actions should be performed at the level of government closest to the people that they will affect, only being passed up to a higher level where necessary in the interests of efficiency.² It is found in many legal systems, sometimes under a different name, as a principle to decide at which level power should be exercised where there is a choice of level for action, such as in Germany between the states (*Länder*) and the Federal Government.
- 1.7 Debates over the future development of the EU in the 1970s and 1980s considered the usefulness of subsidiarity as a guiding principle. The European Parliament proposed that subsidiarity be judged on efficiency, whereas others, such as former Commission President Jacques Delors, suggested that it could be used as a way to reconcile passing more powers to the EU with the maintenance of national authority.³
- 1.8 Without mentioning the principle explicitly, subsidiarity was first introduced into the EU legal order in the area of environment, in the Single European Act which entered into force in 1987. The Treaty stated that the ‘Community shall take action relating to the environment to the extent to which [its] objectives [...] can be attained better at Community level than at the level of the individual Member States’.⁴
- 1.9 It was made an explicit principle, applying to all areas where both Member States and the EU could act (shared and supporting competence), in the Maastricht Treaty which entered into force in 1993. Provisions in the Treaty were broad, stating that ‘in areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community’.⁵ After the initial Danish rejection of the Maastricht Treaty in a referendum in 1992, Member States in the European Council ‘promoted the concept of subsidiarity in

¹ The Law Society and the Law Society of Scotland, *submission of evidence*.

² P. Green, ‘Subsidiarity and the European Union: Beyond the Ideological Impasse’, *Policy and Politics* Vol 22 (1994), pp287-300.

³ *Idem*.

⁴ Single European Act, Article 130r.4. 1986.

⁵ Article 3b in the Treaty establishing the European Community (TEC) as set out in the Maastricht Treaty. Text as adopted in 1992, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOC_1992_224_R_0001_01&from=EN

order to counter the sense [...] that the EU had begun to intrude on too many policy areas and in too much detail'.⁶ The Edinburgh European Council of December 1992 issued guidelines on subsidiarity (and proportionality), noting that subsidiarity 'allows Community action to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified'.⁷

- 1.10 With successive Treaty changes, the Maastricht provisions and Edinburgh guidelines have been developed particularly with regard to the mechanisms and role of different institutions in ensuring respect for subsidiarity. In the most recent Treaty, the scope of the principle in EU law has been expanded to make explicit reference to the subnational level.
- 1.11 The Treaty of Amsterdam (1999) included Protocol (No 2) (of equal legal status to the Treaty) on the application of the principles of subsidiarity and proportionality. The Protocol set out that any proposed Community legislation should be justified with regard to subsidiarity (and proportionality), and specified criteria to be considered when judging whether Community action is justified, including that the issue under consideration should have transnational aspects; that a lack of Community action or that Member States acting alone would conflict with Treaty objectives; and that action at a Community level would produce clear benefits (over action at Member State level) by reason of its scale or effects.⁸
- 1.12 Member State governments in the European Council (at Head of State/Government level) placed the application of the subsidiarity principle on the agenda for the Constitutional Convention and Intergovernmental Conference (IGC) preparing the Constitutional Treaty in the Laeken Declaration.⁹ Although it did not mention subsidiarity in explicit terms, the Laeken Declaration cited problems with the functioning of the EU which relate in broad terms to the principle itself. These included: citizens feeling that the EU should not 'intervene in matters by their nature better left to Member States and regions' elected representatives,' as this activity was 'perceived by some as a threat to their identity'. The Declaration also recognised that citizens wanted 'better democratic scrutiny'.¹⁰
- 1.13 The Constitutional Treaty proposed a direct role for national parliaments in monitoring the proper application of the subsidiarity principle, through a so-called 'early warning mechanism' by which legislative proposals would be sent directly to national parliaments, which could provide a 'reasoned opinion' if they considered the proposal did not meet subsidiarity requirements. The Convention's working group tasked with reviewing subsidiarity monitoring assessed a range of proposals to enhance the Amsterdam Treaty provisions, including the introduction of a 'red card,' which would allow a sufficient majority of national parliaments to block a Commission initiative. The aim was to ensure that any new monitoring mechanism would have real teeth. However, in their final report to the Convention's Praesidium (leadership) members of the working group agreed that any improvements to subsidiarity monitoring should not block decision making, nor make the process more lengthy or cumbersome, and as such the 'red card' idea was not taken forward.¹¹ Another working group, on national parliaments, considered an annual Congress to bring together the European Parliament and national parliaments,

⁶ Senior European Experts Group, *submission of evidence*.

⁷ Senior European Experts Group, *submission of evidence* citing *European Council in Edinburgh, 11-12 December, 1992 Conclusions of the Presidency*.

⁸ European Council, *Treaty Establishing the European Community Protocol 2*, 1999.

⁹ European Council, *Laeken Declaration*, 2001.

¹⁰ *Idem*.

¹¹ Working Group I on the Principle of Subsidiarity, *Conclusions* CONV 286/02 2002 and Federal Trust, *National Parliaments in the Convention on the Future of Europe* (2003).

but this did not achieve consensus, amid concerns that a new body would increase bureaucracy, and was not taken forward.¹² Voters in France and the Netherlands rejected the Constitutional Treaty in 2005 and it did not enter into force.

1.14 However, the idea of giving national parliaments greater powers in the EU legislative process was further developed and adopted under the Lisbon Treaty. The mandate for the Treaty explicitly called for an amending treaty ‘with a view to enhancing the efficiency and democratic legitimacy of the enlarged Union’. It made explicit that the new treaty would enhance the role of national parliaments through ‘a reinforced control mechanism of subsidiarity’.¹³ The Treaty also sought to give a stronger consultative role to the Committee of the Regions (CoR), the body which represents the regions of the EU. The Lisbon Treaty was signed by Member States in 2007 and entered into force in 2009.

1.15 In particular, the Lisbon Treaty introduced changes to subsidiarity in terms of:

- Scope – adding an explicit reference to regional and local dimensions: the Treaties now require consideration of the effectiveness of European, national and local/regional action towards achieving the desired objective; and
- Enforcement: creating new mechanisms to police compliance with the principle by national parliaments, arguably the actor with the greatest connection to citizens in the EU context.

1.16 One commentator described three purposes of these changes as being:

1) To shift the focus from ex-post judicial enforcement of subsidiarity, more towards ex-ante political enforcement of subsidiarity;

2) [...] To introduce an external scrutiny of EU competence by engaging the institutions which had the greatest interest in the enforcement or abuse of subsidiarity, i.e. the national parliaments; and

3) [...] To borrow some of the democratic legitimacy of the national parliaments so as to bolster the EU’s own political mandate.¹⁴

Aims and Application

1.17 Drawing on the language in the Treaties, subsidiarity is normally considered as a two-stage test:

- i. Necessity: why can the objective not be sufficiently achieved by Member States?
- ii. EU value added: why would EU-level action better achieve the objective?

1.18 The Treaties, including in the Protocol on Subsidiarity and Proportionality which mostly sets out procedural steps, have little more to say on the definition of subsidiarity or criteria to be applied. As explained later, there is little relevant case law.

¹² Working Group IV on the Role of National Parliaments, *Final Report* CONV353/02 2002.

¹³ European Council, *Brussels European Council 21-22 June 2007 Presidency Conclusions* 2007.

¹⁴ Professor M. Dougan and Dr T. Horsley, University of Liverpool, *submission of evidence*.

Subsidiarity in the Legislative Process

The Treaty requirement to respect the principle of subsidiarity applies to all EU actors, including the Council. EU institutions must ensure they act in accordance with the principle of subsidiarity by:

- Checking what kind of power the EU has, and if it is shared or supporting competence;
- If so, assessing whether the objectives of the proposed action can be sufficiently achieved by the Member States; and
- Assessing whether the action can, by reason of its scale or effects, be implemented more successfully by the EU.

The Treaties give specific roles to:

- The proposer of legislation;* and
- National parliaments.

The proposer of legislation is obliged to:

- Consult widely before proposing legislation (except in exceptional urgency);
- Explain why the legislation complies with the principles of subsidiarity and proportionality, including by:-
 - Assessing the financial impact
 - Using qualitative and, wherever possible, quantitative evidence;
- Send the draft to national parliaments when published; and
- Take account of views of national parliaments which question compliance with subsidiarity.

National parliaments may:

- Consult with regional parliaments on draft legislation;
- Object if they think that the draft does not comply with subsidiarity; and
- Request their government to take a case to the ECJ on their behalf where they believe a new EU law infringes the principle of subsidiarity.

* Normally the European Commission. It could be also be an initiative from a group of Member States or the European Parliament, a request from the ECJ or the European Investment Bank, or a recommendation from the European Central Bank.

The Role of Different EU Institutions and Actors in Subsidiarity Monitoring

- 1.19 One way to examine how subsidiarity applies in practice is to look at the role of different institutions before, during and after the adoption of legislation. Though all EU institutions are bound by the principle, only national parliaments, the proposer of the legislation (usually the Commission), the co-legislators (the European Parliament and Council), the Committee of the Regions and the ECJ have treaty-defined roles on monitoring subsidiarity. This Treaty role is supplemented by inter-institutional agreements among three of the major EU institutions (the Council, Parliament and the Commission) which also cover how these institutions are to support application of the principle of subsidiarity.¹⁵
- 1.20 The ‘ordinary legislative procedure’ (formerly known as ‘co-decision’) is now the main way that EU legal acts such as regulations and directives are adopted. In most cases, only the European Commission can propose a new legal act. For the proposal to become law, it must be jointly adopted by the Council (which is composed of Ministers from each Member State) and the European Parliament. Under this procedure, the Council acts on the basis of qualified majority voting (QMV), where a specified majority of votes is required, with the share of votes of each Member State reflecting its population size. In a small number of areas, EU legal acts are adopted under ‘special legislative procedures’ with different voting rules or actors. For example, in some cases, the Council acts by unanimity, without co-decision by the European Parliament.

European Council

- 1.21 There is a general duty on all institutions to uphold the principle of subsidiarity, and in large part this manifests itself when they exercise their legislative functions. However, the European Council, composed of the EU Heads of State and Government, does not exercise a legislative role and indeed is expressly forbidden from doing so.¹⁶ This means it is not given a specific role in subsidiarity monitoring.
- 1.22 However, given its remit of setting ‘the general political directions and priorities’ of the EU, the European Council does have a role to play. In its June 2014 Conclusions, the European Council expressed support for the principle of subsidiarity (and proportionality) stating that, ‘In line with the principles of subsidiarity and proportionality, the Union must concentrate its action on areas where it makes a real difference. It should refrain from taking action when Member States can better achieve the same objectives’.¹⁷

European Commission

- 1.23 The European Commission, the body which proposes most EU legislation, must explain for each proposal why it believes EU action to be justified. It does this through impact assessments and an explanatory memorandum. The European Commission’s Impact Assessment Board assesses the quality of Commission subsidiarity assessments. In this way, subsidiarity is also part of the drive for better regulation and robust impact assessments.

¹⁵ European Council, European Parliament and European Commission, *Inter-Institutional Agreement on Better Law-Making* (2013).

¹⁶ TEU, Article 15.1.

¹⁷ European Council, *European Council 26/27 June Conclusions* (2014).

- 1.24 The Commission's own guidelines for impact assessments provide a set of questions for officials to consider before making legislative proposals.¹⁸ These work through the steps involved in assessing subsidiarity (and proportionality) and are set out below.

European Commission Impact Assessment Guidelines (extract)*

'The following contains the questions you should answer when examining whether the two aspects are met in your case. You should not answer them on a yes/no basis, but rather use them to identify the arguments relating to subsidiarity which are relevant in the context of your initiative so that you can elaborate them in your I[mpact] A[ssessment] report. These points should be substantiated with qualitative, and where possible, quantitative indicators.

1. Does the issue being addressed have transnational aspects which cannot be dealt with satisfactorily by action by Member States? (for example a reduction of CO₂ emissions in the atmosphere).
2. Would actions by Member States alone, or the lack of Community action, conflict with the requirements of the Treaty? (e.g. discriminatory treatment of a stakeholder group).
3. Would actions by Member States alone, or the lack of Community action, significantly damage the interests of Member States? (for example action restricting the free circulation of goods).
4. Would action at Community level produce clear benefits compared with action at the level of Member States by reason of its scale?
5. Would action at Community level produce clear benefits compared with action at the level of Member States by reason of its effectiveness?

The answers to these questions may not be the same for each policy option that you examine. You should then answer the questions under each policy option. You should also bear in mind that in some cases the appropriate level for action may be international, rather than European or national.

An additional point should be borne in mind: any assessment of subsidiarity will evolve over time. This has two implications.

First, it means that Community action may be scaled back or discontinued if it is no longer justified because circumstances have changed. It is important to bear this in mind when reviewing existing Community activities, for example in the context of the Commission's better regulation and simplification agenda. For this type of initiative, the I[mpact] A[ssessment] Report should demonstrate that EU action is still in conformity with the subsidiarity principle; you should not rely exclusively on a subsidiarity analysis that was made in the past.

Secondly, it means that Community action, in line with the provisions of the Treaty, may be expanded where circumstances so require. This may include areas where there has been no, or only limited, Community action before. Given the potential political sensitivity of such new activities, the clearest possible justification on the basis of the above questions is essential. Reference to similar activities already carried out at Community level may be useful'.

* Source: European Commission, *Impact Assessment Guidelines* (2009). Available at: ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/iag_2009_en.pdf, accessed on 02 December 2014.

¹⁸ European Commission, *Impact Assessment Guidelines* (2009).

1.25 Further questions seek to ensure deference to Member States:

- ‘Will EU action leave as much scope for national decision as possible while achieving satisfactorily the objectives set?’
- While respecting EU law, are well-established national arrangements and special circumstances applying in individual Member States respected?’¹⁹

1.26 The European Commission draws up an annual report on the observance of the subsidiarity principle.²⁰ The European Commission and the European Parliament have also, in a framework agreement of 2010, agreed to cooperate on application of subsidiarity and proportionality, and undertaken to cooperate with national parliaments to facilitate the exercise of their powers to monitor subsidiarity.²¹

1.27 If national parliaments raise subsidiarity concerns by issuing reasoned opinions on a proposal as set out at paragraph 1.38 below, the Commission also has a role in reconsidering its own legislative proposals to decide whether to maintain, amend or withdraw the proposal.

Council of the European Union

1.28 The Council of the EU is the body which brings together Member State governments, typically in specialised working groups (at official level) or sectoral Councils (for Ministers), to consider and adopt legislative proposals, most often, as co-legislator with the European Parliament. In areas decided by the ordinary legislative procedure, the Council approves measures by qualified majority voting (QMV).

1.29 Governments can and do raise concerns about subsidiarity and proportionality during the legislative process but do not have a veto on QMV dossiers.

1.30 National governments acting in the Council are accountable to national parliaments in different ways, depending on each country’s internal constitutional arrangements. Parliamentary scrutiny is important for democratic legitimacy and accountability, and provides one way for national parliaments to raise subsidiarity and proportionality concerns on EU proposals with national governments. Member State governments may take into account and reflect the arguments and concerns of national parliaments, regardless of the number of reasoned opinions issued by national parliaments, and have further options when certain thresholds of reasoned opinions are met as described further in 1.38 below.

¹⁹ Idem.

²⁰ European Commission, *Subsidiarity and Proportionality – Annual Reports on Better Lawmaking* (2001-13). Available at: ec.europa.eu/smart-regulation/better_regulation/reports_en.htm, accessed on 27 November 2014.

²¹ European Parliament and European Commission, *Framework Agreement on Relations Between the European Parliament and the European Commission* (2011).

Parliamentary Scrutiny: Document-Based, Mandating and Mixed Systems

One Mechanism for National Parliaments to Feed in Subsidiarity Concerns

National parliaments in every Member State have put in place scrutiny procedures to ensure democratic control over the EU decision making process. Some chambers have opted for a 'document-based' system, some a 'mandating model' and others a mixed system. They vary in terms of their legal basis, timing, scope and the extent to which they allow parliaments to constrain national government action in the EU.

These are living systems which evolve in line with wider political shifts and efforts to reform and improve scrutiny. In the UK, for example, the Government is currently working with Parliament to streamline and further strengthen the system of scrutiny in the House of Commons.

They provide an important means for parliaments to raise subsidiarity and proportionality concerns related to EU action, but only with national governments and not directly to the EU institutions.

Document-Based Systems

In document-based systems, parliaments focus on scrutinising legislative proposals and other documents produced by the EU institutions. They do not generally aim to mandate government ministers. Countries with document-based systems include the UK, as well as France, Germany, Ireland, Italy, Cyprus, Portugal, Belgium, Luxembourg, Bulgaria, and the Czech Republic.

The relevant committee will normally report to the full chamber its views on an EU document's political and legal importance, which may include views on subsidiarity and proportionality. Some systems have a scrutiny reserve which provides that ministers should not agree to proposals at Council until scrutiny has been completed.

Both chambers of the UK Parliament adopted a document-based scrutiny system in the 1970s when the UK joined the EU. The UK Government deposits most types of EU documents in Parliament shortly after publication, along with an Explanatory Memorandum summarising the document and the Government's position. The European Scrutiny Committee in the House of Commons and the EU Select Committee, and its six sectoral sub-committees, in the House of Lords scrutinise these documents. The scrutiny reserve resolutions of both Houses provide that government ministers should not agree to proposals in the Council until scrutiny has been completed. Whilst the UK Government can override the scrutiny reserve by agreeing to documents in the Council, both Committees are able to hold the Government to account for overrides including by calling ministers to appear before them.

Mandating Systems

Mandating systems focus on the EU decision making process rather than specific documents, often concentrating on their government's position in the Council. Countries with mandating systems or mixed systems with mandating elements include Denmark, Finland, Sweden, Austria, Poland, Estonia, Latvia, Lithuania, Hungary, Slovakia, Slovenia, and the Netherlands.

Mandating systems vary considerably, and so does their impact on a country's negotiating ability, depending on the breadth of the mandate and whether it is agreed in a public or private session. Effective mandating systems are generally resource-intensive and situated in a consensual, rather than adversarial, political tradition.

The Danish *Folketinget* was the first national parliament in Europe to establish a mandating system. The Danish Government must inform the European Affairs Committee about the Council agenda, seek a mandate on proposed negotiating positions, and obtain a negotiating mandate before important decisions. Some 75 mandates issue each year. The Government is expected to stick to the mandate and may have to ask for a new mandate if a proposal changes fundamentally during negotiations. The Danish tradition of minority coalitions means that it is in the Government's interest to ensure parliamentary support for EU policies. Its subsidiarity checks are based on close cooperation between the European Affairs Committee and the sectoral committees.*

Mixed Systems

Countries with mixed systems including elements of both document-based scrutiny and mandating include Estonia, Hungary, Lithuania, Poland, and Sweden.

The Estonian Government must submit for scrutiny all EU proposals that will entail changes to Estonian law, have a significant economic or social impact or are requested by the Estonian parliament (*Riigikogu*). Sectoral committees refer their opinions to the European Affairs Committee which may include subsidiarity or proportionality concerns. The European Affairs Committee then communicates to the Estonian Government its mandate. Although there is no formal scrutiny reserve, the Estonian Government is expected to abide by this mandate and must justify any failure to do so as soon as possible. The Estonian Prime Minister is also required to inform the *Riigikogu* of government action with regards to EU policy making at least once a year.

* Folketinget (Danish Parliament): European Affairs Committee, *Report on Consideration of EU Matters by the Folketing in Relation to Subsidiarity Checks* (2010).

The European Parliament

- 1.31 The European Parliament is typically co-legislator for EU laws along with the Council. Like all EU institutions, it is bound to respect the principle of subsidiarity. And, as set out above, the European Parliament and Council have a particular role in reconsidering legislative proposals where sufficient national parliaments raise concerns about their compliance with subsidiarity.
- 1.32 In its fact sheet on subsidiarity, the European Parliament takes credit for being 'the instigator of the concept of subsidiarity,' having proposed language in 1984 ahead of the 1987 Single European Act.²² As mentioned above, the European Parliament, along

²² European Parliament, *The Principle of Subsidiarity* (2014).

with the Commission, committed in the framework agreement of 20 November 2010, to cooperate with national parliaments in order to facilitate the exercise by those parliaments of their power to scrutinise compliance with the principle of subsidiarity.

- 1.33 The European Parliament has adopted a number of resolutions expressing its opinions on various aspects of subsidiarity, including:
- Stressing that subsidiarity was a binding legal principle but that its implementation should not obstruct the exercise by the EU of its exclusive competence, nor be used to call into question the *acquis communautaire* (body of EU law);
 - Welcoming the closer involvement of national parliaments in scrutiny of legislative proposals in the light of the principles of subsidiarity and proportionality and calling for an investigation into ways to alleviate any impediments to national parliaments' participation.²³

Committee of the Regions (CoR) and European Economic and Social Committee (EESC)

- 1.34 Subnational levels of government are also represented in Brussels through the CoR, an advisory committee made up of some 353 representatives from local and regional governments in the 28 Member States. All UK members of the CoR are elected politicians representing local authorities or the devolved bodies of Scotland, Wales, Northern Ireland and London. Its non-binding advisory opinions on legislative proposals can include commentary on subsidiarity. As might be expected from this body, given its members, the CoR has an interest in subsidiarity. Some relevant features are:
- its 'subsidiarity and proportionality analysis kit';²⁴
 - recent changes to its own procedures to improve its ability to comment on subsidiarity;²⁵
 - its privileged position as a litigant able to challenge those acts on which it must be consulted before the ECJ for breach of the subsidiarity principle, although noting that it has not yet been used; and
 - in its 2014 work plan, the plan for its Subsidiarity Monitoring Team to 'explore the relevance and feasibility of subsidiarity/proportionality monitoring'.²⁶
- 1.35 The European Economic and Social Committee (EESC) is another consultative pan-EU body which describes itself as a bridge between the EU and organised civil society. Its members include representatives of employers, workers and other interests (non-governmental organisations). Its non-binding advisory opinions must be considered in some cases where the Treaties require it in a wide variety of areas;²⁷ the EESC can also adopt opinions on its own initiative. These opinions can include consideration of respect or otherwise for subsidiarity.

²³ *Idem*.

²⁴ Subsidiarity Network, *Subsidiarity Monitoring at the Committee of the Regions* (2014). Available at: <https://portal.cor.europa.eu/subsidiarity/Pages/Subsidiarityandproportionalityanalysiskit.aspx>, accessed on 1 December 2014.

²⁵ Committee of the Regions, *A New Subsidiarity Strategy for the Committee of Regions* (2012).

²⁶ Committee of the Regions, *Subsidiarity Work Programme* (2014), p5.

²⁷ The EESC issues some 170 opinions per year, of which around 15% are own initiative opinions. Some recent opinions have covered for example the EU's Maritime Security Strategy, and the EU Forest Strategy. For more information see: European Economic and Social Committee, *Opinions & Documents* (2014).

National Parliaments

- 1.36 Many commentators consider national parliaments to be vital actors to increase the democratic legitimacy of the EU, given that they are closer to the citizens of Member States, and turnout in national parliament elections is consistently considerably higher than turnout for the European Parliament elections.²⁸ The UK Government is supportive of stronger involvement of national parliaments in the EU. The current German Government Coalition Agreement states that, for the democratic legitimacy of the EU, a strong role for the European Parliament is as necessary as the close involvement of national parliaments.²⁹ There are two main ways for national parliaments to influence EU legislation. Firstly, through holding national governments accountable, including through scrutiny systems and secondly in their own right, through reasoned opinions and ‘yellow/orange cards’, and potentially as litigants. This section concentrates on the new powers provided for in the Lisbon Treaty, sometimes known as the ‘subsidiarity monitoring’ or ‘early warning mechanism’.
- 1.37 National parliaments may formally object, via a ‘reasoned opinion’ to the Presidents of the Commission, the Council and the European Parliament, if they consider that draft EU legislation does not comply with the principle of subsidiarity. The timings are tight; reasoned opinions must be produced within eight weeks of publication of the draft legislation.
- 1.38 The Lisbon Treaty sets down rules on the consequences of reasoned opinions, based on the number of votes coming from national parliaments. Over certain thresholds, these are commonly referred to as ‘yellow’ and ‘orange cards’:
- Votes: In EU Member States with two chambers of parliament, as in the UK, each chamber’s opinion counts for one vote. If there is only one chamber, as in the case of Ireland, the reasoned opinion counts for two votes. At present, there are a total of 56 votes (28 Member States);
 - ‘Yellow card’: If national parliaments representing at least one-third of the total votes issue reasoned opinions on a proposal, it must be reviewed.³⁰ The institution which produced the draft legislative act may maintain, amend or withdraw it; and
 - ‘Orange card’: If national parliaments representing a simple majority challenge an ordinary legislative procedure proposal on grounds of subsidiarity, the Commission must review it. If, after a review, the Commission maintains its proposal, it must justify why it considers that the proposal complies with the subsidiarity principle in its own reasoned opinion. The European Commission’s reasoned opinion, along with those of the relevant national parliaments, will be referred to the legislator (typically, the European Parliament and the Council). The proposal can be rejected by 55% of the members of the Council or a majority of European Parliament votes.
- 1.39 Since the entry into force of the Lisbon Treaty, two ‘yellow cards’ have been issued but as yet no ‘orange cards’.

²⁸ See for example: Sonia Piedrafita, *EU Democratic Legitimacy and National Parliaments* (2013); and Anand Menon and John Peet, *Beyond the European Parliament: Rethinking the EU’s Democratic Legitimacy* (2011). However, for a contrary view, see, for example, Jon Worth, *Strengthening the Role of National Parliaments in EU Decision-Making is Not the Way to Improve the EU’s Legitimacy* (2014).

²⁹ Federal Christian Democratic Party (CDU), *Coalition Agreement* (2013). Available (in German) at: www.cdu.de/sites/default/files/media/dokumente/koalitionsvertrag.pdf, accessed on 02 December 2014.

³⁰ Reduced to one-quarter for proposals in the field of police and judicial cooperation in criminal matters.

- 1.40 National parliaments can co-ordinate amongst themselves in many different ways, including through *Conférence des Organes Spécialisés dans les Affaires Communautaires (COSAC)*, which is a twice-yearly meeting of the European affairs committees of EU Member States' national parliaments. It also includes parliaments of candidate countries (those applying for EU membership) and members of the European Parliament (MEPs). It is supported by the COSAC Secretariat which includes a permanent official, an official from the European Parliament and officials from the countries holding the former, current and future rotating EU presidencies. The first COSAC meeting was held in Paris in 1989 under the initiative of the then French Presidency of the Council, which wished to strengthen the role of national parliaments in European decision-making.³¹
- 1.41 The Lisbon Treaty also introduced new provisions which allow national parliaments to request their government to take a case to the ECJ on their behalf where they determine that legislation adopted breaches the subsidiarity principle. The UK Government and the European Committees in both Houses of Parliament have signed a Memorandum of Understanding to set out the procedures by which the UK Parliament may make use of these new powers.³²
- 1.42 These new provisions have not yet been used in the UK, or indeed in any other Member State. But the UK Parliament has indicated its willingness to consider making use of the power to bring a legal challenge to proposals on subsidiarity grounds. In July 2014, the Chair of the House of Lords EU Committee wrote to the President of the European Commission regarding a proposal for a directive on occupational pension schemes (8633/14) which the Committee considered failed to respect subsidiarity, as the vast majority of such schemes were in four countries only and the Commission had not provided any qualitative or quantitative substantiation of the need for EU action and that they could not be addressed sufficiently by Member States.³³ The letter concluded that if the proposal were adopted as currently drafted, the Committee would be minded to recommend consideration of a legal challenge to it. A revised draft was published in October 2014, and it remains under consideration.

³¹ COSAC, *Historical Development* (2014).

³² HMG, *Memorandum of Understanding on the Implementing of Article 8 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality* (2014). Available at: www.parliament.uk/documents/commons-committees/european-scrutiny/Final-MoU-text.pdf, accessed on 27 November 2014.

³³ HMG, *Proposal for a Directive of the European Parliament and of the Council on the Activities and Supervision of Institutions for Occupational Retirement Provision Commission Staff Working Document* (2014). Available at: <http://europeanmemoranda.cabinetoffice.gov.uk/memorandum/proposal-for-directive-of-the-european-parliament-of-the-council-on-the-activities-supervision-of#sthash.EmUOY4Cz.dpuf>, accessed on 27 November 2014.

'Yellow Cards' in Practice

Monti II

The first instance of a 'yellow card' came in 2012 in relation to the Monti II proposal, which attempted to strike an EU-wide balance between the right to strike and the freedom of companies to offer services across the EU.

Twelve chambers of national parliaments (totalling 19 votes), including the House of Commons, objected on subsidiarity grounds. This represented objections from more than a third of the possible votes, and therefore triggered a 'yellow card' requiring the European Commission to reconsider. The European Commission withdrew the proposal, although it asserted that the proposal did not breach subsidiarity. The UK Government was disappointed with the Commission's reasoning but welcomed the withdrawal of the proposal.*

This is held up by some as an example of the power which national parliaments can have over EU policy making.

European Public Prosecutor's Office (EPPO)

National parliaments delivered a second 'yellow card' on 28 October 2013 on a draft legislative proposal to establish a European Public Prosecutor's Office (EPPO); with a total of 19 votes from Parliaments in 11 Member States, including the UK. The proposed EPPO would be able to prosecute fraud against the EU budget directly in national courts.

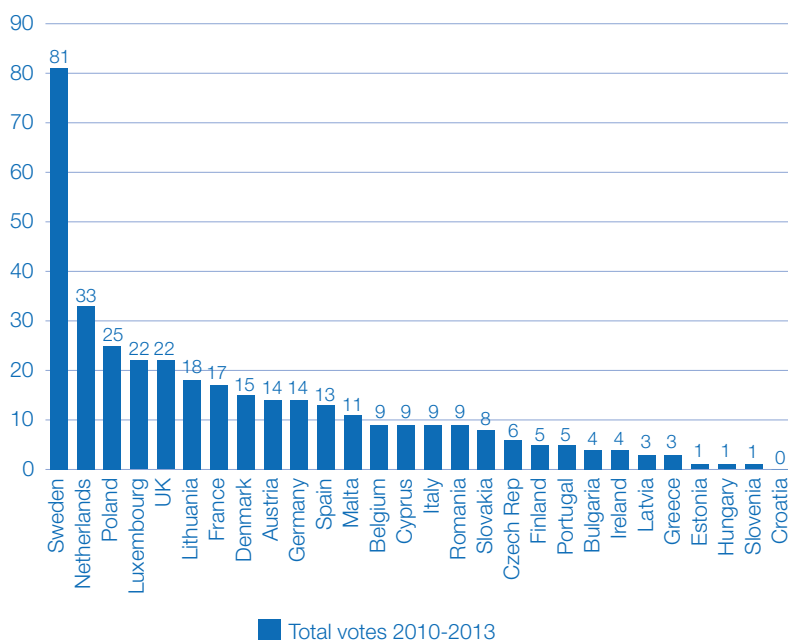
The Commission published its response on 27 November 2013, announcing that the proposal would remain unchanged. The House of Lords EU Committee and the House of Commons European Scrutiny Committee wrote to the Commission to express their concern at the swiftness with which the decision had been made to retain the proposal and the lack of consideration given to other options. They were concerned by the lack of engagement in the review process and the failure in addressing national parliaments' concerns as well as the narrow view of subsidiarity set out by the Commission.

The Commission maintained its position without making any concessions. The House of Commons European Scrutiny Committee registered its continued disappointment at the Commission's handling of the 'yellow card' and concluded that the Commission has undermined faith in the 'yellow card' procedure.

It should be noted that the UK has not opted into this proposal (which is within the scope of the Justice and Home Affairs opt-in) and so is not bound by it.

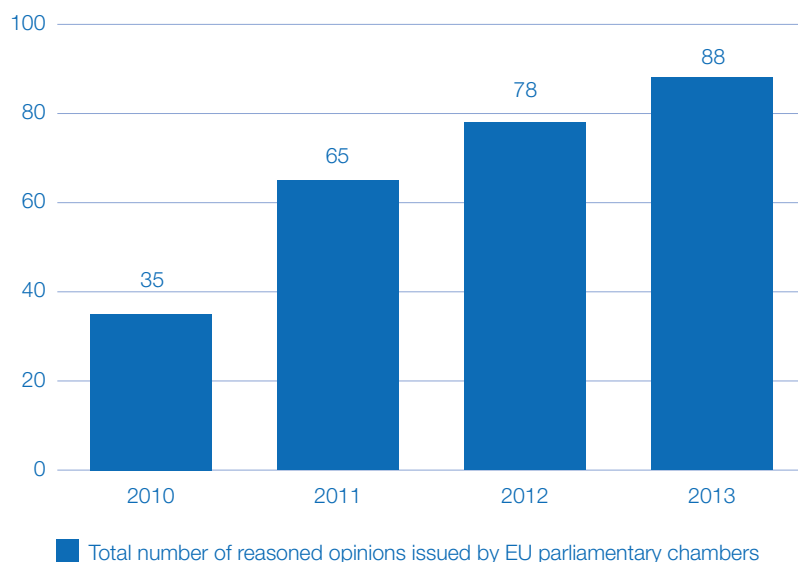
* European Commission, *Decision to Withdraw the Proposal for a Council Regulation on the Exercise of the Right to Take Collective Action Within the Context of the Freedom of Establishment and the Freedom to Provide Services*, 2012.

Figure 1: Showing Number of Parliamentary Reasoned Opinions Submitted to the Commission between 2010-2013



1.43 The latest available figures, in the table below, show that 88 reasoned opinions were submitted to the Commission in 2013.³⁴ The trend is clearly one of increase as shown by the growth in figures year on year and may be ascribed to the increasing focus on democratic accountability and the role of national parliaments in the EU.³⁵

Figure 2: Showing Total Number of Reasoned Opinions Issued by EU Parliamentary Chambers



³⁴ European Commission, *Annual Report 2013 on Relations between the European Commission and National Parliaments* (2013).

³⁵ *Idem.*

- 1.44 The UK Parliament's two chambers issued a total of eight reasoned opinions in 2013. To date in total, the House of Commons European Scrutiny Committee has issued 18 reasoned opinions and the House of Lords EU Committee has issued ten.³⁶
- 1.45 The Swedish National Legislature (*Riksdag*) has issued a noticeably high number of reasoned opinions, and the specific way in which its scrutiny system works has been put forward as an explanation for this. The *Riksdag* operates a mixed scrutiny system, and examines all EU legislative proposals (as well as other EU documents) for their compliance with the principle of subsidiarity. Each proposal is sent to one of the fifteen parliamentary committees. These committees are different from the UK Parliamentary Select Committees, being more like permanent bill committees that scrutinise all domestic bills as well as EU proposals in their subject area. As such, EU proposals are dealt with and discussed via a mainstreamed process which divides the workload across committees according to their substantive area of expertise.

European Court of Justice (ECJ)

- 1.46 Member States and EU institutions may bring challenges to new EU legislation in the ECJ in Luxembourg if they believe it does not comply with the principle of subsidiarity.³⁷ Additionally, national parliaments now have the right to request Member State governments to take a challenge, as described at 1.41 above. To date, national parliaments have not yet exercised this right.
- 1.47 When a challenge is brought in the ECJ to EU legislation on grounds of breach of subsidiarity, the court will examine:
- Process: has the legislator sufficiently explained why it considers action at the EU level is justified in to achieving a desired policy objective?
 - Substance: is action at the EU level justified to achieve a desired policy objective?
- 1.48 Courts may also use the concept of subsidiarity as an interpretative tool where EU legislation is ambiguous and needs to be settled in favour of either greater or lesser scope for Member State action.
- 1.49 On process, in the Deposit Guarantee Schemes Directive case, Germany asked the ECJ to consider a breach of subsidiarity in respect of a piece of legislation which was alleged not to have set out why action at the EU level was justified.³⁸ However, the Court was of the view that whilst subsidiarity was not specifically referred to in the legislation, the legislation did explain why the proposed action could not be taken by Member States acting alone. As such, the Court decided that the EU had fulfilled the need to explain compliance with the principle of subsidiarity.

³⁶ UK Parliament Website, *Subsidiarity*. Available at: www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/scrutiny-reserve-overrides/ and; UK Parliament Website, *Subsidiarity*. Available at: www.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee-/committee-work/parliament-2010/subsidiarity/, accessed on 27 November 2014.

³⁷ Challenges to EU action on grounds of breach of subsidiarity can also come before the EU courts in cases brought by people and legal persons (such as companies) in certain limited circumstances.

³⁸ Germany v Parliament and Council, Case C-233/94, [1997] ECR I-2405.

- 1.50 On substance, in the Working Time Directive case, the UK challenged a piece of EU legislation (that regulated the maximum working week) on the basis of a breach of the principle of subsidiarity. The ECJ found that the political judgement of the EU legislature (that action at the EU level was justified to meet EU objectives) was sufficient to meet the requirements of subsidiarity in this case.³⁹
- 1.51 To date, there have been few cases on subsidiarity and the ECJ has not struck down any EU legislation for breach of the principle. However, there are signs in some recent cases of closer scrutiny from the ECJ. For example, it examined in greater detail than in previous cases whether measures such as the Biotechnological Inventions Directive, the Second Tobacco Labelling Directive, and the Food Supplements Directive were justified in the light of subsidiarity.⁴⁰ The ECJ concluded on the facts of each case that the relevant objectives could not satisfactorily be achieved by Member States acting alone, thus requiring action to be taken by the EU, and therefore subsidiarity was not breached.
- 1.52 For the most part, subsidiarity cases before the ECJ have concerned measures relating to the EU's internal market where, once it is established that the EU has competence to act at all, the subsidiarity question is relatively easy to answer given that there is normally a strong justification for action to be taken at the EU level in light of the cross-border impact. The ECJ's approach to the principle of subsidiarity in respect of areas where there is not necessarily a cross-border element (such as environmental or social policies) remains to be seen.

³⁹ United Kingdom v Council, Case C-84/94, [1996] ECR I-5755. The UK won on one point, as to whether a reference to Sunday as the main rest day should be included in the Directive.

⁴⁰ Netherlands v European Parliament and Council, Case C-377/98, [2001] ECR I-7079; British American Tobacco/Imperial Tobacco (R v Secretary of State for Health, ex parte British American Tobacco (Investments) and Imperial Tobacco), Case C-491/01, [2002] ECR I-11453, and R v Secretary of State for Health, ex parte Alliance for Natural Health, Cases C-154/04 and C-155/04, [2005] ECR I-6451.

B. Proportionality

Introduction

- 1.53 Like subsidiarity, proportionality is an underlying principle which governs the exercise of EU competences. However, there are important differences in how it has developed its scope, the role of different actors and the current debate.
- 1.54 Article 5(4), paragraph 1 TEU and TFEU states:
- [Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.](#)
- 1.55 This means that, where the EU acts, that action must be suitable to achieve the desired objective, and that the action should not go beyond what is necessary in order to achieve that objective. This includes a requirement that where there are differing ways to achieve an objective, the least onerous should be taken.
- 1.56 Proportionality is at one level an expression of simple common sense ('don't use a sledgehammer to crack a nut').⁴¹ In the EU context, however, proportionality as a legal concept is the basis of many complex lines of case law, with slightly different tests applied to different contexts, and nuanced judgements as to whether the legislator has acted in accordance with proportionality.

Historical Development of Proportionality

- 1.57 The origins of the concept of proportionality go back a long way: Robert Palmer quotes Lord Reed who traces it back to Aquinas.⁴² In some of its original expressions, it recognises the need to protect individuals from the coercive power of the state.⁴³ This helps to explain why it developed in the cases of the European Court of Human Rights in Strasbourg as well as being a basis for judicial review of state actions in other contexts, such as German public law.⁴⁴
- 1.58 In the EU context, proportionality as a general principle of EU law has developed primarily through the case law of the ECJ, rather than through successive Treaty amendments, which has been the primary way in which the principle of subsidiarity has developed in the EU. The EU concept differs in some ways from those found in national legal systems. Most obviously, it is about a supranational set of institutions and laws, which have effects both on states and individuals. It also applies to Member States, when acting within the scope of EU law. In the EU, proportionality also concerns the balance between the different levels of government even when EU law-based rights of individual citizens are involved.

⁴¹ Robert Palmer, Monckton Chambers, *submission of evidence*.

⁴² *Idem*.

⁴³ There is another ancient branch of proportionality applicable to criminal law, which aims to limit retribution ('an eye for an eye'). Similarly, punitive trade measures (reprisals) are limited by the principle under WTO law, and proportionality is an important requirement of international humanitarian law (the laws of war). These are not considered further here.

⁴⁴ The European Court of Human Rights is not an EU institution but rather affiliated to the Council of Europe, which currently has 47 member countries, and takes cases relating to implementation of the European Convention of Human Rights. It has had considerable influence on the EU, however, given the EU's desire to show that it offers equivalent protection to human rights (also a general principle of EU law), and to avoid conflicting jurisprudence.

- 1.59 Some important ECJ judgements found proportionality to be a 'general principle' of EU law. In *Fedesa*, the ECJ set out an overview:

The Court has consistently held that the principle of proportionality is one of the general principles of Community [EU] law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.⁴⁵

- 1.60 As EU law and treaties have developed, both to govern more areas and to enhance the status of individual rights (and property rights), there have been more areas of tension between different policy goals. EU legislation has become potentially more intrusive, and there has been a greater need to set out how to balance those tensions and protect individual rights. Proportionality therefore establishes some limits of EU law, and provides a means for balancing between different rights and principles recognised in EU law.
- 1.61 The debate on proportionality (as for subsidiarity) intensified during negotiations on the Maastricht Treaty, with some Member States keen to restrict the EU's role to what was necessary to establish the Single Market.⁴⁶ This concern with ensuring the appropriateness of EU action was reflected in the December 1992 Edinburgh European Council's guidelines on subsidiarity and proportionality. These noted that the effective application of the proportionality principle required minimising financial and administrative burdens, and leaving as much room as possible for national decision-making, including by setting minimum standards and ensuring that action proposed is as simple as possible.
- 1.62 These guidelines formed the basis for Protocol 2 on Subsidiarity and Proportionality which was adopted in the Amsterdam Treaty of 1999. The Protocol stated that, 'in exercising the powers conferred on it, each institution shall [...] ensure compliance with the principle of proportionality, according to which any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty'.⁴⁷ It also required the Commission to justify why proposed legislation complied with the proportionality principle. Proportionality has now been recognised expressly in the Lisbon Treaty.

Aims and Application

- 1.63 For a fuller understanding of the content and application of the principle, it is necessary to look at the case law. In his evidence, Palmer set out the classic tests:
- a. Does the measure pursue a legitimate objective? Where applicable, is it one which is capable of justifying a derogation from a fundamental freedom (in other words, do the Treaties acknowledge the interest to be worthy of protection and sufficiently important to justify a derogation, or has the ECJ recognised it to be so)?
 - b. Is the measure suitable to achieve the desired end?
 - c. Is the measure necessary to achieve the desired end (i.e. is it no more restrictive than is necessary to produce that result)?

⁴⁵ R v Ministry of Agriculture, Fisheries and Food, ex parte Fedesa and others, Case C-331/88, [1990] ECR I-4023, (paragraph 13).

⁴⁶ Senior European Experts Group, *submission of evidence*.

⁴⁷ Treaty of Amsterdam, Treaty Establishing the European Community, Protocol 2.

d. Are the disadvantages caused disproportionate to the aims pursued? (or sometimes, depending on context: does the measure impose an excessive burden on the individual in relation to the desired end?)⁴⁸

1.64 Applying these tests to a hypothetical example, a legitimate objective might be to remove barriers to trade in a particular kind of product within the EU. This aim of developing the EU's internal market is clearly legitimate as it is one of the EU's treaty aims. Proposed legislation to achieve the objective might, for example, require every Member State to recognise the findings of other Member States that the product is fit for human consumption. This might interfere with other interests or freedoms, such as each Member State's wish to ensure safe food for its citizens, but the objective is important enough to be potentially capable of justifying this interference. The legislation is potentially suitable for achieving the goal, as it should level the playing field for traders wanting to do business across the whole EU. The detail of the proposal would need to be examined to see if it is necessary to achieve the goal, or if less restrictive measures might achieve the same outcome. Then the negative consequences or burdens need to be compared in scale to the anticipated benefits – in other words, a cost-benefit analysis.

1.65 Given the separation of powers, with different roles assigned to judicial, executive and legislative functions, courts are generally slow to substitute their decisions for those of the legislature, instead focusing on procedural aspects of decision-making, checking that appropriate factors have been considered with due weight, and that inappropriate factors have not been considered. Courts also consider how much discretion the legislator has and how appropriate it is for the court to review the subject matter. In *Fedesa*, the ECJ touched on this:

'The intensity with which the test is applied – that is to say, the degree of weight or respect given to the assessment of the primary decision-maker – depends upon the context'.⁴⁹

1.66 This has been developed further in two broad strands of case law, one relating to proportionality in EU legislation, and the other in relation to Member State action. These are described below.

Proportionality as a Limit to the Actions of EU Institutions and EU Legislation

1.67 EU institutions must act in a proportionate way both when legislating and when taking decisions which affect individuals. The ECJ has had a number of opportunities to consider whether EU legislation is proportionate, and will sometimes subject EU laws to close scrutiny, particularly if rights are involved. It will look at the underlying need for legislation – what interest or issue is the legislation trying to address? Are there alternative ways to address the issue, which restrict the Single Market less, or which interfere less with rights? It will also consider a cost-benefit analysis – what costs does the legislation impose in relation to the benefits? This is often very fact-specific. Taking account of the limits on the scope of judicial review of EU legislation set out at 1.65 above, there is a reasonably high bar to be overcome before annulment of legislation. In general, the ECJ

⁴⁸ Palmer, *submission of evidence*.

⁴⁹ *Idem*.

only annuls EU legislation if the EU legislature has exercised its discretion in a manifestly inappropriate way, and not, for example, because the legislation could have been better drafted.⁵⁰

- 1.68 In the *Internationale Handelsgesellschaft* or *Solange I* case (1970) which related to the Common Agricultural Policy (CAP), the ECJ found both fundamental rights and proportionality to be principles of EU law.⁵¹ Commentators have noted that finding otherwise could have caused the German Constitutional Court to review EU law in light of the German constitution, thus opening up constitutional conflict between the German Constitutional Court and the ECJ. Proportionality ‘in effect reconciled fundamental rights and supremacy’.⁵²
- 1.69 A total ban on some substances in livestock farming was upheld as proportionate in the *Fedesa* case, even taking into account the substantial negative financial consequences for some traders, as the ECJ concluded that it would only interfere in such policy judgments on grounds of proportionality where the action was manifestly inappropriate.⁵³
- 1.70 Similarly, in the *Affish* case, an EU Decision banning the importation of Japanese fish into the EU on health grounds was upheld as, even though not all Japanese fish factories had hygiene issues and measures short of a total ban were available, the ECJ considered that it would not be practical to check the hygiene standards of all Japanese fish factories and that a reasonably representative sample had been checked. Therefore, it was deemed proportionate to ban all Japanese fish imports.⁵⁴
- 1.71 The ECJ has on occasion struck down EU measures as being disproportionate. One example was an EU Directive which required manufacturers of animal feed to indicate, at a customer’s request, the exact composition of the feed. This was struck down as not being necessary to protect health, and going beyond what was required to protect health.⁵⁵
- 1.72 In Case C-310/04 *Spain v Council*, the ECJ concluded that the principle of proportionality had been infringed on primarily procedural grounds. Because the EU institutions had not taken into consideration all the relevant factors and circumstances of the situation which the act was intended to regulate, the ECJ was unable to confirm that the Community legislature had correctly concluded that the act would meet the desired objective, within the limits of its broad discretion.⁵⁶

⁵⁰ The ECJ held in Case C-189/01 *Jippes* [2001] ECR I-5689 at paragraph 82: ‘As regards judicial review of compliance with [the principle of proportionality], bearing in mind the wide discretionary power enjoyed by the Community legislature in matters concerning the common agricultural policy [...] the criterion to be applied is not whether the measure adopted by the legislature was the only one or the best one possible but whether it was manifestly inappropriate’.

⁵¹ *International Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide*, Case C-11/70 [1970], ECR 1125.

⁵² Wolf, Sauter, ‘Proportionality in EU Law – a Balancing Act’, *Cambridge Yearbook of European Legal Studies*, Vol. 15 (2012-13).

⁵³ *R v Minister for Agriculture, Fisheries and Food, ex p Fedesa*, Case C-331/88, [1990] ECR I-423.

⁵⁴ *Affish BV v Rijksdienst voor de Keuring van Vee en Vlees*, Case C-183/95, [1997] ECR I-4315.

⁵⁵ *ABNA Ltd and Others v Secretary of State for Health and Others*, Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04, [2005] ECR I-10423.

⁵⁶ *Spain v Council*, Case C-310/04, [2006] ECR I-07285.

Proportionality in National Law

- 1.73 Proportionality also applies to national actions within the scope of EU law. For example, when Member States adopt detailed national legislation to give effect to an EU law, they must exercise whatever discretion they have in compliance with the general principle of proportionality. Their exercise of discretion can be challenged before the ECJ. The case-law shows that the ECJ will scrutinise Member State actions carefully, particularly when they seek to rely on exemptions to proportionality.
- 1.74 For example, the ECJ ruled in Case C-239/02 *Douwe Egberts* that, although Member States could derogate from harmonised labelling rules in order to protect public health and consumer protection, this power must be exercised consistently with the principle of proportionality.⁵⁷ The ECJ found that the Member State had breached the principle of proportionality in implementing the Directive, because less restrictive means were available to it to achieve the objective.
- 1.75 Some other examples of challenges to Member States' national laws on proportionality grounds are shown in the following cases:
- In the famous case of *Cassis de Dijon* (1979), the ECJ held that minimum alcohol content requirements for spirits imposed by German law were disproportionate. A less restrictive means of attaining the desired end could be achieved by requiring labelling, which would inform consumers.⁵⁸
 - In *Kreil*, the Court held that a rule requiring all armed units in the German armed forces had to be male was disproportionate.⁵⁹
 - In *Canal*, the ECJ found that Spanish legislation which required operators of certain television services to register details of their equipment was disproportionate where it duplicated controls already carried out in Spain or another Member State.⁶⁰
- 1.76 More generally, Member States are bound by general principles of EU law, including proportionality, when they act in areas governed by or within the scope of EU law. For example, in case C-413/99 *Baumbast*, the ECJ found that the decision by one Member State to deprive an EU national (who had resided for several years in another Member State) of his right to reside solely because he lacked cover for emergency treatment was not proportionate to the legitimate aim of ensuring that he would not become an unreasonable burden on that Member State's welfare system.⁶¹
- 1.77 Following this case law, it can be said that an increasing number of national rules are subjected to scrutiny by the ECJ on the grounds of proportionality, and that the principle has become even more central in the assessment of the compatibility of national legislation with EU law.⁶²

⁵⁷ *Douwe Egberts NV v Westrom Pharma NV and Others*, Case C-239/02, [2004] ECR I-7007.

⁵⁸ *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (aka Cassis de Dijon)*, Case C-120/78, [1979] ECR 649.

⁵⁹ *Kreil v Bundesrepublik Deutschland*, C-285/98, [2000] ECR I-69.

⁶⁰ *Canal Satelite Digital SL v Amministracion General del Estado and Distribuidora de Television Digital SA (DTS)*, Case C-390/99, [2002] ECR I-607.

⁶¹ *Baumbast*, Case C-413/99, [2002] ECR I-07091.

⁶² A. Dashwood; M. Dougan; B. Rodger; E. Spaventa; and; D. Wyatt, *Wyatt and Dashwood's European Union Law* (2011), p329.

Comparison of Proportionality and Subsidiarity

- 1.78 Much of what has been said above with respect to subsidiarity applies equally to proportionality, although there are notable differences. Both principles are recognised by the ECJ as general principles of EU law. They therefore have a powerful status in the EU legal system, just below the status of Treaty articles, but also to be used when interpreting the Treaties. EU legislation can be struck down by the ECJ for breach of general principles of EU law.
- 1.79 The EU institutions must consider respect for proportionality and subsidiarity throughout the process of drafting and negotiating of legislation. Practical guidance, derived in part from the Edinburgh European Council guidelines on subsidiarity and proportionality (1992) has been carried through to the European Commission's impact assessment process, and the Lisbon Treaty's Protocol 2 on Subsidiarity and Proportionality.
- 1.80 The scope of the two principles is different. Proportionality is applicable more broadly than subsidiarity, in that it applies not only to all EU institutions but also to Member States when acting or legislating in areas governed by EU law. And proportionality applies across the board of EU law whilst subsidiarity (so far as Article 5 TEU is concerned, at least) does not apply in any area of exclusive EU competence.
- 1.81 There are some major differences in the role of different institutions, both in theory and in practice. Proportionality has largely been developed through the case-law of the ECJ, whereas there is very little case-law on subsidiarity. Chapter Two examines views on why courts have not played a major role to date on subsidiarity.
- 1.82 The development of subsidiarity as a concept has gone hand in hand with growing support for an increased role for national parliaments in the EU legislative processes, and the creation of specific mechanisms, such as yellow cards, as a means of helping increase the democratic legitimacy of the EU. However the current mechanism for national parliaments (described at 1.37) is explicitly focused on subsidiarity rather than proportionality. Whether it should also cover proportionality is considered in chapters two and three.
- 1.83 Whilst proportionality appears to be a less controversial concept, insofar as less evidence was received on it, the cases above illustrate its powerful role in many cases before the ECJ – as well as national courts.

C. Flexibility Clause (Article 352 TFEU)

Introduction

1.84 Article 352 TFEU provides a power that can be used where no specific provisions of the Treaty confer express or implied powers to act, if such a power appears nonetheless necessary to attain one of the Treaty objectives. It provides:

If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.⁶³

1.85 While this provides a potentially wide and flexible legal basis that could extend to anything coming within EU competence, as defined by its tasks and activities in Articles 3 TEU and 3, 4 and 6 TFEU, the powers in Article 352 TFEU are not unlimited and cannot be used to extend EU competence.

1.86 The Lisbon Treaty has broadened the wording of the flexibility clause which used to refer to the common market, to reflect that the scope and objectives of EU action have widened to encompass issues beyond the Single Market, such that Article 352 TFEU can now be used for ‘action by the Union [...] necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties’.⁶⁴

1.87 The powers in Article 352 TFEU cannot be used to circumvent restrictions in other more specific Treaty articles. Lisbon amendments also made clear that Article 352 TFEU cannot be used for action in the area of Common Foreign and Security Policy as an area in which decision-making is for the most part intergovernmental and taken by Member States.⁶⁵ Article 352(3) expressly prohibits the use of Article 352 to harmonise the laws or regulations of Member States where this is excluded by the Treaties. For example, Article 352 could not be used to circumvent the exclusion of harmonisation in, for example, Articles 165(4) – concerning education, vocational training, youth and sport – or 167(5) TFEU – culture.

1.88 Another change in the Lisbon Treaty is that the European Parliament must now consent to the use of Article 352 TFEU. Under the previous version (Article 308 TEC), it was merely consulted. However, it does not co-legislate with the Council.

1.89 Upon the adoption of the Lisbon Treaty, the Heads of State or Government adopted two relevant Declarations. Declaration (No. 41) specifies that the reference to objectives of the Union in Article 352 is not limited to promoting peace, EU values and the well-being of EU people with respect to external action.

⁶³ Article 352 TFEU.

⁶⁴ *Idem*.

⁶⁵ HMG, *Review of the Balance of Competences between the UK and the EU: Foreign Policy* (2013).

- 1.90 Declaration (No. 42) on Article 352 of the Treaty on the Functioning of the European Union made clear the view of EU Heads of State or Government on its restricted nature:

The Conference underlines that, in accordance with the settled case law of the Court of Justice of the European Union, Article 352 of the Treaty on the Functioning of the European Union, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Union powers beyond the general framework created by the provisions of the Treaties as a whole and, in particular, by those that define the tasks and the activities of the Union. In any event, this Article cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaties without following the procedure which they provide for that purpose.⁶⁶

- 1.91 This is intended to make clear that this article cannot be used to widen the scope of the EU's powers beyond those already set out in the EU Treaties. It also makes clear that Article 352 TFEU cannot be used to adopt provisions which would have the effect of amending the EU Treaties, as the Treaties themselves already lay down specific procedures for their amendment.
- 1.92 Additionally, there are a number of procedural safeguards to control this power. Any proposal made must secure the unanimous agreement of the Council and the consent of the European Parliament.
- 1.93 The Lisbon Treaty also inserted a provision in Article 352(2) requiring the Commission to refer proposals using this Article to national parliaments. This is intended to ensure that national parliaments are able to consider such proposals and whether to issue reasoned opinions under the early warning mechanism.
- 1.94 Some Member States have enacted additional controls on the use of Article 352 involving national parliaments. The UK has brought in additional controls on the use of Article 352 at the national level, under Section 8 of the European Union Act 2011 ('EU Act 2011'), which requires prior parliamentary approval (in the form of an Act of Parliament) before a UK minister can support an EU proposal based in whole or in part on Article 352, with certain exemptions. Similarly, under German law, the German Government may only support the use of Article 352 after prior approval from the parliament, following an important decision by its Constitutional Court on the compatibility of the Lisbon Treaty with the German Constitution.⁶⁷
- 1.95 Recent case-law confirms that there is no obligation on the EU actors to use powers which may be available to them under Article 352 TFEU.⁶⁸

⁶⁶ *Idem*.

⁶⁷ Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], BVerfGE 123, 267 (June 30, 2009). Available at: www.bverfg.de/entscheidungen/es20090630_2bve000208en.html, accessed on 27 November 2014.

⁶⁸ The *Pringle* case involved a challenge to the legality of the European Stability Mechanism which was adopted on an intergovernmental basis rather than using Article 352. *Thomas Pringle v Government of Ireland, Ireland and The Attorney General*, Case C-370/12 [2012] ECR – 00000 in particular paragraph 67, citing *Commission v Council* ('ERTA'), Case 22/70, [1971] ECR 263, paragraph 95.

Article 352 and the German Constitution

- The German Constitutional Court, the *Bundesverfassungsgericht*, was asked to consider whether Article 352 was compatible with the German Constitution. It found there was a problem:

‘because the newly worded provision makes it possible substantially to amend treaty foundations of the European Union without the constitutive participation of legislative bodies...’
- The German Constitution does not allow the executive (the government) to transfer the power to create new powers or competences (the *Kompetenz-kompetenz*) to other bodies without the involvement of the legislature (parliament). The Lisbon Treaty requires the Commission only to draw the national parliaments’ attention to Article 352 proposals but does not require national parliament approval. The *Bundesverfassungsgericht* therefore required any Article 352 proposals to be approved by the *Bundestag* and *Bundesrat* (the two chambers of the German Parliament) before the German representative in the EU could approve the proposal.
- Much like Section 8 of the UK European Union Act 2011, that requirement poses a clear limitation on the potential for the use of the flexibility clause.

Historical Development

- 1.96 The EU Treaties have always contained a catch-all provision like Article 352 TFEU. Article 235 of the original Treaty of Rome (1957) specified that the power should be used for ‘action by the Community[...] necessary to attain, in the course of the operation of the common market one of the objectives of the Community,’ and this provision remained unchanged up to and including the Treaty of Nice. Prior to the Lisbon Treaty (2009), this clause was previously Article 308 of the Treaty on the European Community (TEC). This provision was extensively used in the 1970s and 1980s, allowing the EU to engage actively in regional and environmental policies at a time when these fields were not yet codified in the Treaties.⁶⁹ It has been used much less frequently in recent years, and is now subject to a number of procedural and substantive restrictions as described above.
- 1.97 In a number of policy areas, following the use of Article 308 in those areas, articles were subsequently adopted in Treaty amendments, which provided a specific legal base for action in each area. Thus for example in the case of sanctions, whilst the EU had clear powers to adopt coercive measures short of the use of force against third countries, it was unclear for some time the extent of its power to impose targeted sanctions on individuals and entities which had no obvious links to a third country. Article 308 was used alongside other Treaty articles to give effect to UN and EU sanctions in such cases. In the Lisbon Treaty, two new Treaty articles, Article 75 and 215, now give clear powers to implement targeted sanctions against individuals whether or not they have links to third countries.

⁶⁹ Dr. Theodore Konstadinides, University of Surrey, *submission of evidence*.

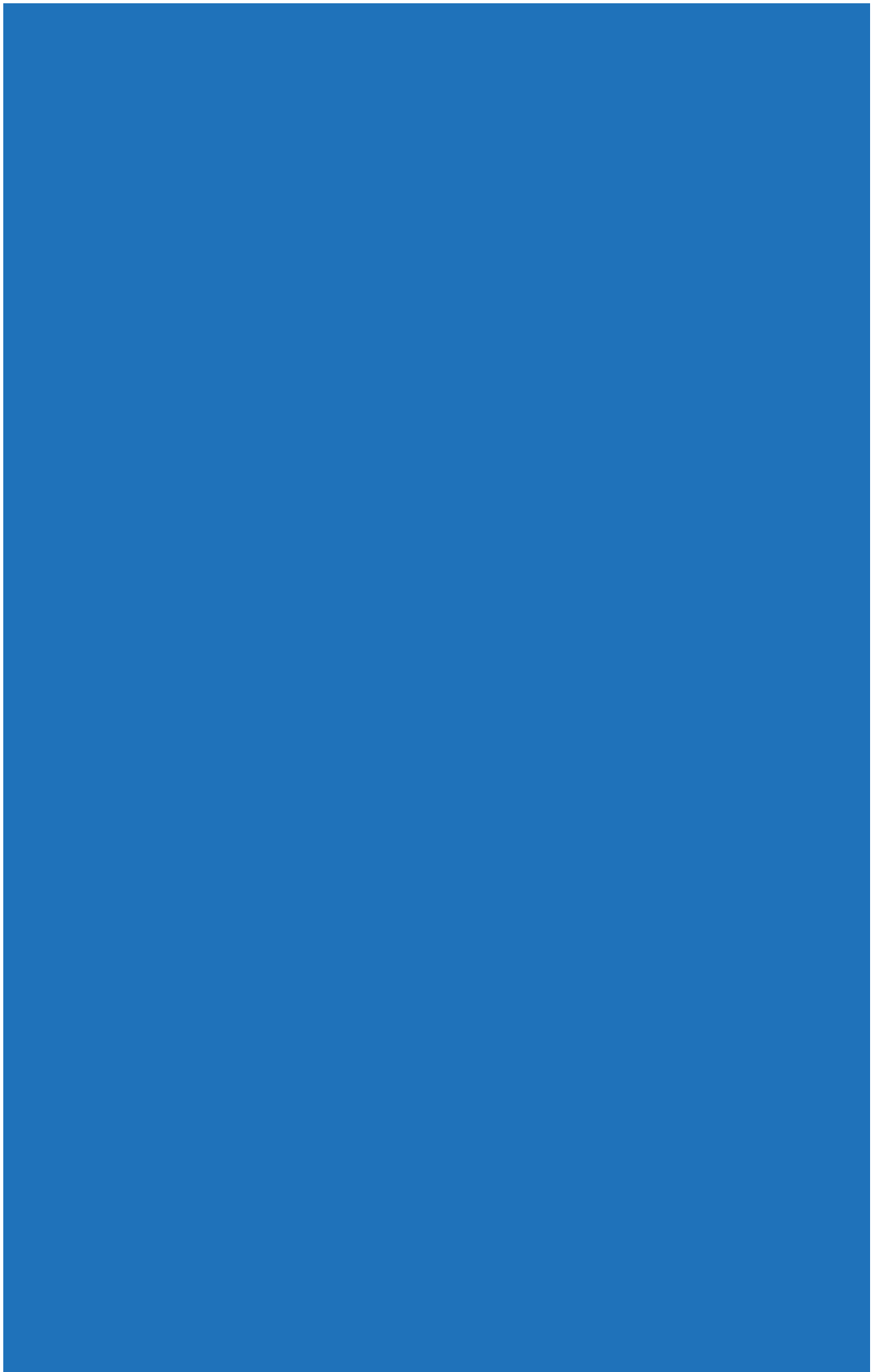
- 1.98 There have been a few examples of EU action on the basis of Article 352 TFEU since the entry into force of the Lisbon Treaty, such as:
- legislation to recognise electronic versions of the EU's Official Journal as authentic and legally binding;
 - approving the multi annual framework of the EU agency on fundamental rights (this sets out the themes under which the agency can work);
 - a decision to deposit EU historical archives at the European University Institute in Florence; and
 - a decision to adopt a 'Europe for Citizens' programme.
- 1.99 This relatively limited use of Article 352 since the Lisbon Treaty seems predictable given the availability of more specific provisions, restrictions arising from case-law, and the restrictions on its use both at the EU and national level.

Scope and Interpretation of Article 352 TFEU

- 1.100 There is considerable case law relating to the predecessor versions of Article 352, in which the ECJ confirmed some limits on its broad scope.
- 1.101 Opinion 2/94 concerned accession by the European Community to the European Convention on Human Rights (ECHR).⁷⁰ The ECJ held that Article 308 TEC, the predecessor of Article 352 TFEU, did not provide a legal basis for the EU to join the ECHR because this would have fundamental institutional implications. The ECJ found that Article 308 could not serve as a basis for widening the scope of (EU) powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the (EU).
- 1.102 Similarly in *Kadi*, the ECJ held that Article 308 TEC could not be used to pursue objectives relating to the EU's Common Foreign and Security Policy.⁷¹ It could only be used to pursue objectives of the European Community (as was) as specified in the TEC. This restriction on the use of Article 352 has now been made explicit in Article 352(4).

⁷⁰ Opinion 2/94 [1996] ECR I-1759

⁷¹ *Kadi and Al Barakaat International Foundation v Council and Commission*, Cases C-402/05P and C-415/P, [2008], ECR I-06351, paragraphs 198-204.



Chapter 2: Impact on the UK National Interest

Introduction

- 2.1 This chapter looks at the impact of the current Treaty arrangements on the UK national interest, in particular on how well the various actors are able to, and do, use the current mechanisms to ensure application of the principles of subsidiarity and proportionality.
- 2.2 In multilateral decision-making there is an inherent tension between taking decisions quickly and effectively on the one hand, and the processes and time needed to ensure national democratic accountability and legitimisation of these decisions on the other. Such challenges are found beyond the EU context, including in decisions reached in multilateral trade negotiations, at the United Nations (UN), North Atlantic Treaty Organisation (NATO) or other groupings. In today's context of high economic interdependence, views differ over how best to ensure both democratic accountability and effective shared governance.
- 2.3 This chapter is structured in the following way:
 - Part A: Evidence relating to the purpose and value of subsidiarity and proportionality in general;
 - Part B: Evidence relating to the impact of and respect for subsidiarity in practice;
 - Part C: Evidence relating to the impact of and respect for proportionality in practice;
 - Part D: Evidence relating to institutional questions and mechanisms to protect subsidiarity and proportionality; and
 - Part E: Evidence relating to the Flexibility Clause.

A. The Purpose and Value of Subsidiarity and Proportionality

- 2.4 The evidence stressed the importance of the concepts of subsidiarity and proportionality as a necessary and desirable part of a system of checks and balances in the EU legal system. The Senior European Experts Group, an independent body consisting of former high-ranking British diplomats and civil servants, including several former UK ambassadors to the EU and a former Secretary-General of the European Commission, describes '[m]aking subsidiarity and proportionality work better' as 'a key British objective in the EU for over 25 years'.¹

¹ Senior European Experts Group, *submission of evidence*.

- 2.5 As senior politics lecturer at the University of Bath, Dr Maria Garcia puts it: ‘although open to interpretation, the broad idea of acting/legislating/regulating at the level most appropriate to obtain the desired policy outcome is an effective way to establish a framework for EU action’.² The Confederation of British Industry (CBI) agrees that ‘subsidiarity and proportionality ... [are] the correct vehicles to manage the balance of competences between the EU and its Member States’.³ The Electoral Reform Society described the principles of subsidiarity and proportionality as ‘essential’ in organisations such as the EU.⁴ Similarly, Business for New Europe considered the ‘interlocking principles of subsidiarity and proportionality’ to be ‘extremely important for the effective functioning of the European Union in a way which respects the rights and responsibilities of national, regional and local government across the Union; and which ensures that due account is taken of the impact of EU action, especially EU legislation, on business and civil society in the Member States’.⁵
- 2.6 Some business groups would like to see subsidiarity applied more. For example, the CBI considers that ‘the principles of subsidiarity and proportionality have been insufficiently applied in practice resulting in a feeling of ‘mission creep’ by Europe into areas of ‘lifestyle regulation’. This has contributed to the EU’s legitimacy being undermined in a number of Member States. The CBI is calling for the principles to be re-asserted and a much less prescriptive approach to EU legislation to be taken. This requires a change of culture so that the default position is ‘Europe where necessary, national where possible’ backed-up by action from national parliaments using the Yellow Card procedure more effectively to ensure the principle of subsidiarity is respected’.⁶ The CBI’s evidence to the Balance of Competences Social and Employment Policy report stated that ‘prescriptive requirements can undermine the principle of subsidiarity by failing to recognise the diversity of models within the EU. Rather than attempting to impose aspects of one model on other Member States the focus should instead be on outcomes rather than process’. Amongst the examples of such prescriptive requirements that, in the CBI’s view, undermine the principle of subsidiarity, was the Working Time Directive.⁷ The UK Government shares these concerns and has had a long-standing position about EU legislation such as the Working Time Directive which it considers does not allow sufficient flexibility for national circumstances.
- 2.7 It was also noted that the Commission sometimes failed to recognise where there was already adequate national regulation. For example, Syed Kamall MEP highlighted that the Commission had brought forward a proposal on EU-wide access to bank accounts when others considered a preferable route would be mutual recognition of national rules.⁸ More generally in the Free Movement of Capital report, respondents recognised that some markets, for example pensions and retail banking, remain primarily national for various reasons, and the International Regulatory Strategy Group considered that ‘[i]n principle, EU-wide regulations should focus on markets which are larger, have more players and economies of scale. In practice, the focus should be on those products or services that are most easily tradable across national borders’.⁹

² Dr. Maria Garcia, University of Bath, *submission of evidence*.

³ CBI, *submission of evidence*.

⁴ Electoral Reform Society, *submission of evidence*.

⁵ Business for New Europe, *submission of evidence*.

⁶ CBI, *submission of evidence*.

⁷ HMG, *Review of the Balance of Competence between the UK and the EU: Social & Employment* (2014), paragraph 3.28.

⁸ Syed Kamall, MEP, *submission of evidence*.

⁹ HMG, *Review of The Balance of Competences between the UK and the EU: Single Market: Financial Services and the Free Movement of Capital* (2014), paragraphs 3.131-3.135.

Reasons for a Growing Focus on Subsidiarity

2.8 Some evidence set out factors which could explain the growing focus on subsidiarity in the EU context. These include:

- Enlargement from 6 to 28 members. It was suggested that this has made subsidiarity more important as the Commission and its officials are no longer so familiar with the situations in each Member State.¹⁰ It has also increased the diversity within and among a greater number of Member States, rendering very detailed, centralised legislation less appropriate in a number of areas.¹¹
- Expansion of the EU's competences. Successive Treaties have conferred new powers on the EU to act in many areas, greatly increasing the possibilities for choices to be made between EU and national or regional powers and policies.
- Popular discontent with EU action. This has been one of the main drivers to develop subsidiarity protection. For example, the Senior European Experts Group notes that the European Council promoted the concept of subsidiarity following the initial Danish rejection of the Maastricht Treaty in 1992 'in order to counter the sense, widespread after the rush of legislation necessary for the establishment of the Single Market on 1 January 1993, that the EU had begun to intrude into too many policy areas and in too much detail'.¹²
- The financial crisis: Whilst some consider it resulted from too much subsidiarity (Member States inadequately controlling their financial sectors), others consider that the EU's response has gone too far the other way by bringing in very detailed supra-national control which has limited the scope for Member States or indeed national parliaments to make choices.¹³
- Changing of voting rules: The shift to more frequent use of QMV rather than unanimity means individual Member States no longer have the ability to veto the adoption of laws in those areas.¹⁴
- Dissatisfaction on the part of national parliaments: in particular a perception that the EU institutions do not take into account their views.¹⁵
- Accountability: The preamble to Protocol No 2 sets out the aspiration, '[...] to ensure that decisions are taken as closely as possible to the citizens of the Union'.¹⁶ There remain concerns about the 'democratic deficit' in the EU, meaning the gap, or perceived gap, between Member State citizens and the EU institutions.

¹⁰ *Record of 22 May 2014 stakeholder event, Dublin.*

¹¹ For example, there is much greater environmental diversity within the EU now.

¹² Senior European Experts Group, *submission of evidence.*

¹³ *Record of 7 May 2014 stakeholder event, FCO London.*

¹⁴ Senior European Experts Group, *submission of evidence.*

¹⁵ House of Commons Library Standard Note (SN/IA/6297); Vaughne Miller, *National Parliaments and EU Law-Making: How is the 'Yellow Card' System Working?* (2012).

¹⁶ Treaty on European Union, Protocol No.2.

Tensions and Synergies between EU and Wider International Action

- 2.9 Another important aspect of subsidiarity is how EU action fits into a wider international framework, for example, G20, World Trade Organisation or United Nations rule-making. There are many examples of EU action which are giving effect to international obligations on the part of the EU and/or its Member States. A common theme in the Balance of Competences review as a whole was the tension between EU and international action, particularly where EU action arguably went beyond the requirements of the international framework, as well as identifying areas where EU action as a bloc facilitated greater international influence. These tensions are very relevant to the proportionality and subsidiarity – or otherwise – of EU action, in that it can be disproportionate where EU action goes beyond international requirements, and subsidiarity may best be respected by international rather than EU action, or conversely by EU level action which gives effect to international obligations.
- 2.10 For example, the Balance of Competences Report on Transport highlighted that, ‘for aviation and maritime as inherently international modes of transport, there was close interest in EU representation in international organisations and how global rules and bloc rules interacted’.¹⁷ Stakeholders acknowledged the business opportunities which core EU legislation has created, notably the Single Market itself and the legislation which underpins it. The UK Chamber of Shipping, the trade association for the UK shipping industry, said: ‘The existence of the Single Market has brought tremendous economic benefits for all businesses engaged in trading within it’.¹⁸ However, maritime stakeholders were of the view that when implementing International Maritime Organisation (IMO) or International Labour Organisation (ILO) rules, the EU must recognise the primacy of those bodies in regulating the industry and should not seek to augment rules agreed internationally. Creating slightly different regional EU rules can lead to a loss of competitiveness in the global market. As the Royal Yachting Association, which represents recreational and competitive boating, put it: ‘Insofar as the EU considers it necessary to encourage or require member states to adopt international resolutions then it should confine itself to doing just that, without embellishing or modifying the resolutions’.¹⁹
- 2.11 The Balance of Competences report on Competition and Consumer Policy highlighted that ‘The EU has been a significant factor in the sprouting of competition regimes across the world in recent years, not only in the case of applicants for membership but also through its conclusion of trade agreements. Cooperation and exchange of information on cases between competition authorities across the globe can be expected to grow’.²⁰ It also finds that ‘[g]enerally, the EU system has proved to be a more popular transplant than the US one, the only feasible alternative, and many overseas competition regimes are modelled on the EU provisions. The proposed Transatlantic Trade and Investment Partnership (TTIP) provides an opportunity for the EU and the US to further embed principles of fair competition and effective enforcement which could act as a benchmark for other trade agreements’.²¹

¹⁷ HMG, *Review of The Balance of Competences between the UK and the EU: Transport* (2014), paragraph 2.2.

¹⁸ *Idem*, paragraph 2.17.

¹⁹ *Idem*, paragraph 2.69.

²⁰ HMG, *Review of The Balance of Competences between the UK and the EU: Competition and Consumer Policy* (2014), paragraph 4.8.

²¹ *Ibid*, paragraph 4.9.

Tensions and Synergies between EU and National, Regional or Local Action

- 2.12 Some commentators considered that sometimes more EU regulation would be appropriate in line with subsidiarity, for example in developing the Single Market further through more harmonised, prescriptive approaches which help create a level playing field for competition.²² Cross-border and global challenges such as climate change were also considered to justify EU-wide regulation.²³ It was noted that businesses operating cross-border had a strong interest in a single regulatory regime.²⁴ Michael Emerson noted that sometimes regulation was correctly made at EU level but that legal frameworks at the EU level could be let down by inadequate national enforcement, citing health and safety in the agri-food sector as an example.²⁵
- 2.13 Some respondents observed that subsidiarity was respected when choices were made to use lighter or more flexible forms of legislation: for example, a Directive, which specifies the end but leaves detailed implementation to Member States, as opposed to a directly binding Regulation, or a framework law rather than stipulating every detail in legislation law.²⁶

Case Study: Subsidiarity and the Common European Sales Law

In 2011, the European Commission proposed a Common European Sales Law (CESL)*. This would create a pan-European contract law for cross border online sales, to which traders and consumers could opt in. National contract laws would continue to exist in parallel. The Commission explained that its proposal aimed to expand the digital Single Market by making it simpler for small and medium enterprises (SMEs) and individual consumers to buy and sell across national borders within the EU, reducing legal uncertainty, avoiding the need for translations and country-specific advice and guaranteeing a level of consumer protection, thus expanding consumer choice.

A number of groups question the need for the CESL, including on subsidiarity grounds. For example, the Law Society believes it ‘to be a disproportionate policy response to an unclear problem and to infringe the subsidiarity principle. The Society did not agree that it had been shown that lack of a common law of contract poses a significant barrier to cross border trade’. The overarching concern of UK stakeholders is that, as there is no robust evidence that a problem exists, then the Commission should not be legislating. However, other groups support the CESL, for example, the Law Society of Scotland which considers that ‘A single system is preferable to a proliferation of national laws to cover the transactions envisaged’. This shows that assessments of subsidiarity can differ.

Although a number of Member States and stakeholders argued that the subsidiarity principle has not been followed, and UK and European umbrella organisations have called for the proposal to be withdrawn, negotiations in Council continued and the European Parliament voted in favour of the Regulation (albeit with a narrower scope, limiting the application of the Regulation to distance sales).

* European Commission, *Common European Sales Law* (2014) para 3.94 at p.53. Available at: ec.europa.eu/justice/contract/cesl/index_en.htm, accessed on 27 November 2014.

~ Law Society and Law Society of Scotland, *submission of evidence*.

²² *Record of 7 May 2014 stakeholder event, FCO London.*

²³ HMG, *Review of The Balance of Competences between the UK and the EU: Environment & Climate Change* (2014).

²⁴ *Record of 7 May 2014 stakeholder event, FCO London.*

²⁵ Michael Emerson, CEPS, *submission of evidence*.

²⁶ *Record of 7 May 2014 stakeholder event, FCO London.*

Case Study: Cross Border Health Threats

A proposal on cross-border health threats is currently under negotiation. It aims to streamline and strengthen EU capacities and structures for responding to serious cross-border health threats (such as pandemic flu), building on the existing structures to coordinate surveillance and control of communicable diseases. Under this proposal, the Commission seeks to extend the scope of the procedures to include cross-border health threats from biological, chemical, environmental and unknown origins.

The UK Government welcomes the proposal particularly the legal mandate given to the Health Security Committee and supports the recognition of subsidiarity in the proposal. This means Member States retain the freedom to protect their citizens in the way that they see fit, including in how they organise their health care centre.

The British Medical Association (BMA) said that:-

‘The BMA is committed to improving the health of the UK citizens and welcomes EU activities which complement UK Government work in this field. Future policy developments in this sector should continue to respect the principle of subsidiarity and the right, enshrined in the EU Treaties, of Member States to organise and finance their healthcare systems according to national practices’.

HMG, *Review of the Balance of Competences between the UK and the EU: Health* (2013)

- 2.14 Evidence was received from the Scottish Government, the Convention of Scottish Local Authorities (COSLA), National Assembly of Wales and academics about the mechanisms for ensuring subsidiarity within the UK’s devolution settlement. The Welsh Assembly praised the excellent working relations among the different UK legislatures on subsidiarity issues. UK reasoned opinions have reflected regional/devolved concerns, for example on the European Public Prosecutor proposal reflecting the devolution of justice within the UK.²⁷ The devolved administrations have offices in Brussels, and participate in the UK delegation to the CoR.²⁸
- 2.15 Local authorities in England are represented by the Local Government Association (LGA) which also provided evidence. They estimate that half of all legislation which applies to the sector derives from EU law, whether through directly effective Regulations or through domestic implementation of Directives. For example, respondents to the Environment and Climate Change Report highlighted a number of such issues where they thought that UK competence was more appropriate than EU competence, for example, on land use planning.
- 2.16 Whilst Article 5(3) TEU acknowledges for the first time the place of regional and local level in EU governance, EU law itself creates no self-standing rights for regional bodies to be involved in the assessment process. Subsidiarity at this level is important – as the Electoral Reform Society observed: ‘much of EU policy is actually implemented at the sub-state level, by regional and local governments. For instance, many EU structural funds are designed to be implemented at regional level’.²⁹ One participant in the Brussels seminar considered that national authorities tended to focus on [subsidiarity] issues

²⁷ However the Commission was not sympathetic to arguments based on devolution in criminal justice in relation to the European Public Prosecutor proposal, considering that, ‘the division of powers between a Member State, its regions and its municipalities is a purely internal matter’.

²⁸ The UK delegation includes two members of the London Assembly, National Assembly of Wales, Scottish Parliament and Northern Irish Assembly, and also includes two alternates from the Scottish Parliament.

²⁹ Electoral Reform Society, *submission of evidence*.

affecting their level of government as opposed to matters affecting local government.³⁰ The Law Society and the Law Society of Scotland conclude that '[t]rue subsidiarity must mean subsidiarity within the UK, not just between the national and European levels'.³¹

Differing Conceptions of the Aims of Subsidiarity

- 2.17 Although evidence received was positive about subsidiarity and proportionality in principle, closer examination reveals differences of emphasis or opinion as to the underlying aims of the principle of subsidiarity. In general terms, these aims may be characterised as being focused on one or more of the following themes:
- Democracy/accountability: protecting the powers of Member States, partly because they are seen as having greater democratic legitimacy. Also ensuring that decisions are taken closer to citizens by actors who are responsive and accountable to them;
 - Efficiency: focusing attention on the most efficient level (that is, EU, national or sub-national) for action to achieve the intended objectives; and/or
 - Better regulation: limiting EU action to cases where it is really needed, and avoiding unnecessary or disproportionate legislation.
- 2.18 Accordingly, respondents had a range of suggestions on how to assess the current effectiveness of the principles (each considered in more detail below):
- As a procedural requirement or framework for facilitating involvement of different actors in political decision-making;
 - Improving the (democratic) legitimacy of the EU;
 - As a means to ensure (economically) efficient regulation; and/or
 - As a method of protection from powerful central authorities and over-regulation.

Involving Actors in Political Decision-Making

- 2.19 Many respondents recognised the tension inherent in the EU mechanisms to govern subsidiarity, which are set out as legal requirements but which touch on intrinsically political questions.
- 2.20 Dougan and Horsley suggest that one way of considering subsidiarity is as a purely procedural principle which 'only has the meaning which is attributed to it by political action expressed in accordance with the channels provided for under the Treaties. In other words: subsidiarity is no more or less than an expression of constitutional dialogue between legislative stakeholders within the EU's complex institutional framework'.³²
- 2.21 Takis Tridimas suggests that the legal provisions on subsidiarity should be judged on whether they 'provide a sustainable framework for facilitating the co-operation of national governments, enable decision-making at multiple levels and provide effective processes for the participation of various actors in political decision-making'.³³ In other words, it is not easy for courts to enforce subsidiarity in the same way as they do proportionality.

³⁰ *Record of 29 April 2014 stakeholder event, Brussels.*

³¹ *Law Society and Law Society of Scotland, submission of evidence.*

³² *M. Dougan and T. Horsley, submission of evidence.*

³³ *Takis Tridimas, King College, London, submission of evidence.*

2.22 A number of participants at the legal seminar held as part of the outreach for this report were also of the view that the ECJ was not well-placed to decide political questions such as whether action would be better taken at the EU or national level. Some considered that the Court could do more to ensure that adequate reasons were given to justify EU-level action, thus strengthening judicial review of the subsidiarity requirements in the Treaties.³⁴

Improving the Democratic Legitimacy of the EU

2.23 Charles Grant of the Centre for European Reform notes that theory on political institutions considers different aspects of legitimacy:³⁵

- Input legitimacy: are the institutions accountable through elections?
- Output legitimacy: are the resulting laws effective and respected? Do the institutions deliver good outcomes for people?

2.24 Grant assesses the input legitimacy of the EU as somewhat mixed: ‘Given the complexity of decision-making, with power shared among many institutions, lines of accountability in the EU have never been easy to follow’.³⁶ He considers that the recent euro area crisis has weakened input legitimacy in the EU, and as he and others point out, euro area legitimacy cannot be addressed by greater European Parliament involvement since the EU budget, over which the European Parliament has oversight, is marginal in this regard. Grant therefore argues for greater involvement of national parliaments as a way to increase the EU’s input legitimacy (whilst calling for better policies as the best way to increase output legitimacy).

2.25 Garcia argues that more time for consultations would increase input legitimacy by allowing greater consultation with civil society and other stakeholders.³⁷ The need for longer consultation was a consistent theme in other Balance of Competences reports. And at the Emerging Themes workshop, a particular concern was raised about rushed policy making in response to crises, which caused problems further down the line.³⁸ A Dutch parliamentary report also identifies a disconnect between citizens and EU policy-making: ‘Few citizens know that ministers attend every Council and that a key responsibility of Members of Parliament (MPs) is to scrutinise the actions of these ministers, and that MPs also operate independently in Brussels. This is a problem of input legitimacy’.³⁹

Ensuring Economically Efficient Regulation

2.26 The Senior European Experts Group consider that, ‘[s]ubsidiarity and proportionality are principles whose purpose is to make the EU more effective’.⁴⁰ However Dougan and Horsley question whether subsidiarity is to be considered primarily as a test of economic efficiency in regulation, or whether it is more focused on democratic legitimacy and preserving localism. They ask whether subsidiarity is ‘driven primarily by the search for regulatory efficiency, by asking for the ‘added value’ of EU level action in dealing with

³⁴ Record of 7 May 2014 stakeholder event, FCO London.

³⁵ Charles Grant, *How to Build a Modern European Union* (2013).

³⁶ Idem.

³⁷ Garcia, *submission of evidence*.

³⁸ Record of 27 June 2014 stakeholder event, *Emerging Themes*.

³⁹ Dutch Parliament, *Ahead in Europe: On the Role of the Dutch House of Representatives and National Parliaments in the European Union Final Report, Rapporteurship* (2014).

⁴⁰ Senior European Experts Group, *submission of evidence*.

regulatory problems; or is subsidiarity instead to be treated as an essentially political test, informed by concerns about democratic legitimacy, which seeks to promote localised decision-making in recognition of the essentially national basis for political authority (even if those purely national solutions may not be so 'efficient')?' They point out that these two conceptions may pull in different directions: 'there will be issues where it makes economic sense for the EU to act, but there is little political desire or basis for overreaching local or national action'.⁴¹

Subsidiarity in Economic and Monetary Policy: Tensions between Efficiency and National Ownership

- Participants at a panel event hosted by Bruegel considered the trade-offs between the Commission's ability to provide rigorous and robust advice and to police properly the governance system and the question of national ownership. They argued that proper co-ordination and better analysis from the Commission would require giving up a level of national ownership that Member States were not willing to do. This presented a problem and a trade-off between an effective system and subsidiarity concerns.
- They commented that different Member States or groups of Member States may be willing or need to tolerate different levels of intrusiveness from the Commission depending on the level of integration between them. They discussed the challenges that can flow from a lack of delivery on the part of Member States, which can lead to the Commission tightening the rules but in turn leads to further lack of ownership because discretion is removed.
- There was a suggestion that the authority of the system (the Commission) needs to find a better balance between rule implementation and the use of a certain amount of discretion. For example, it was argued that the Commission needs to apply the Stability and Growth Pact rules with an element of discretion as this is in the common interest of all Member States. This was seen as a difficult thing to get right. However, if it is not, it was argued that co-ordination will not work.

Source: HMG, *Review of the Balance of Competences between the UK and the EU: Economic and Monetary Policy* (published in parallel).

Protection from Powerful Central Authorities and Over-Regulation

- 2.27 Nick Barber examines whether subsidiarity in the EU is the same concept as that found in Catholic thought (where it is presented as a bulwark against over-intrusive collective bodies). He concludes not, but that it is a constitutional principle for the EU, more limited in scope and practical application. He sees its importance as being more in what it says about European vision, citing former European Commission President Romano Prodi's book, *Europe As I See It*, where Prodi refers to subsidiarity as part of the identity of the EU.⁴²
- 2.28 The Senior European Experts Group note that the UK's focus on subsidiarity and proportionality is: '[p]artly [...] political, a belief that an EU which regulates less and better will be more popular in the UK, but it also reflects a national culture that tends to be wary of excessive regulation'.⁴³

⁴¹ M. Dougan and T. Horsley, *submission of evidence*.

⁴² Nick Barber, University of Oxford, *submission of evidence*.

⁴³ Senior European Experts Group, *submission of evidence*.

2.29 These different understandings of the aims of subsidiarity should be borne in mind when looking at the evidence on the application of subsidiarity in practice, as people's assessment will depend on their views of the aims.

2.30 For example, former European Commission President Jose Manuel Barroso situates subsidiarity in the context of both democracy and better regulation:

For me, subsidiarity is not a technical concept. It is a fundamental democratic principle. [This] [...] demands that decisions are taken as openly as possible and as closely to the people as possible. Not everything needs a solution at European level. Europe must focus on where it can add most value. Where this is not the case, it should not meddle. The EU needs to be big on big things and smaller on smaller things – something we may occasionally have neglected in the past. The EU needs to show it has the capacity to set both positive and negative priorities.⁴⁴

2.31 New First Vice-President of European Commission, Frans Timmermans, who has an over-arching responsibility for subsidiarity and better regulation, echoed the concepts of legitimacy and efficiency in his confirmation hearing with the European Parliament:

A better shared understanding among us all of the real, political meaning of subsidiarity will help the Commission avoid unnecessary proposals and help us find the best form of intervention when action is necessary.⁴⁵

B. Evidence on Subsidiarity in Practice

2.32 Evidence on how well subsidiarity and proportionality are applied in practice was mixed. Some respondents considered that subsidiarity and proportionality were by and large well-respected, and indeed, suggested that there was increasing respect for them within the EU. For example, the Law Society and Law Society of Scotland judged that, 'As a general rule the EU lawmaking system functions well and for the most part the laws laid down at EU level do comply with proportionality and subsidiarity'.⁴⁶ At the other end of the spectrum were those who considered that mere 'lip-service' was paid by the institutions to the principles.⁴⁷ Professor Derrick Wyatt was of the view that, 'Neither subsidiarity nor proportionality has acted as an effective brake on the exercise by the EU institutions of their extensive lawmaking powers'.⁴⁸ He explained this by arguing that the interpretation and application of the principle of subsidiarity included a large element of policy assessment and political judgment and allowed 'the EU institutions to present almost any proposal for EU wide action as having an objective which can be better achieved at EU level than at national or sub national level, and that is precisely what they do'.⁴⁹ Similarly, Wyatt considered that, 'as applied by the EU Courts[,] proportionality is a principle with neither the track record nor the potential to compensate for the wide scope of EU lawmaking competence and the inclination of EU lawmakers to exercise that discretion to the full'.⁵⁰

⁴⁴ José Manuel Durão Barroso, *State of the Union Address* (11 September 2013). Available at: europa.eu/rapid/press-release_SPEECH-13-684_en.htm, accessed on 27 November 2014.

⁴⁵ Frans Timmermans, *Verbatim Record of Confirmation Hearing with the European Parliament* (7 October 2014). Available at: <http://www.elections2014.eu/resources/library/media/20141022RES75832/20141022RES75832.pdf>, accessed on 27 November 2014.

⁴⁶ Law Society and Law Society of Scotland, *submission of evidence*.

⁴⁷ Kamall and Charles Tannock, MEP, *submission of evidence*.

⁴⁸ Professor Derrick Wyatt QC, Brick Court Chambers, *submission of evidence*.

⁴⁹ *Idem*.

⁵⁰ *Idem*.

- 2.33 The new President of the European Commission, Jean-Claude Juncker, acknowledged that the implementation of subsidiarity could be improved in his speech to the European Parliament:

We must deliver in applying the principle of subsidiarity. Since the Maastricht Treaty, we have been talking about the correct application of the subsidiarity principle. What we are doing, however, is not sufficient. Our speeches last longer than our efforts to make real headway in reducing red tape, and to ensure that the European Commission – and the European Union – concerns itself with the really major European issues instead of interfering from all angles in every detail of people's lives.⁵¹

- 2.34 Respondents to this and other Balance of Competences reports gave examples of individual proposals which they considered did not respect subsidiarity, as well as areas where they had views on the appropriate level of action – global, EU, national, sub-national or local.⁵² Respondents also highlighted that the choice of type of legislation was relevant to subsidiarity, since Directives offer greater flexibility to Member States than Regulations, and mutual recognition requires fewer changes than harmonisation.

Some Evidence on Subsidiarity from Other Balance of Competences Reports

Review of the Balance of Competences between the United Kingdom and the European Union: Environment and Climate Change

- Although there were many areas of cross-border problems, where EU and global action were preferred, there were equally a number of areas of environmental policy where national level competence was deemed more appropriate by respondents. These include areas such as land use planning, noise, protection of soil, flooding, environmental crime and justice. For example, in 2006, the Commission proposed a soil framework directive which the Council rejected, primarily on grounds of subsidiarity [Paragraphs 2.12-2.134].

Review of the Balance of Competences between the United Kingdom and the European Union: Trade & Investment

- Evidence revealed strong support for Member State competence on trade promotion on the basis that national competence allows for local and regional characteristics and interests to be better taken into account. By contrast, respondents felt there was little brand value to be extracted from 'Made in the EU' [Paragraph 3.37].

⁵¹ European Commission and European Parliament, *A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change* (2014).

⁵² For example, Dr. Luke McDonagh, Cardiff University, *submission of evidence*.

Review of the Balance of Competences between the United Kingdom and the European Union: Transport

- Some stakeholders from the recreational aviation, rail and roads sectors urged a lighter touch or simply less legislation with respect to local and domestic transport which operates solely within a single member state and has no effect on the Single Market. This would allow greater scope to reflect local circumstances [Paragraph 3.27].
- While the concept of the Single Market in transport services is generally strongly supported, so too are the principles of subsidiarity and proportionality [Executive Summary].
- Hence there was evidence of frustration with some of the social, safety and environmental rules especially where they affect purely domestic transport without any international dimension [Paragraphs 2.143-2.144].
- An example of what was perceived to be disproportionate EU action was given in the area of harmonised rules for issuing driver licences. In the view of the Freight Transport Association (FTA), the medical requirements set for vocational drivers below the age of 45, with five-yearly renewals of the licence, were over-prescriptive and they would prefer a national derogation for the renewal of licences [Paragraph 3.25].

Review of the Balance of Competences between the United Kingdom and the European Union: Animal Health and Welfare and Food Safety

- While the benefits of coordinated EU action were supported by a range of respondents, there was still a significant view that flexibility was also important, particularly for animal health. The chairman of the Sheep Health and Welfare Sector Council expressed the view that Member States require flexibility to make national rules to prevent the introduction of animal diseases and to take local circumstances into account. He also argued that the UK should have greater competence to act on animal health in order to capitalise on our island status and build higher health standards than the rest of the EU [Paragraph 2.25].

Review of the Balance of Competences between the United Kingdom and the European Union: Agriculture

- The Bruges Group identified ‘as a rule of thumb’ matters which do not cross borders or affect the Single Market for other countries should be left for the local authorities. Participants at the academic roundtable argued that EU competence was appropriate for transboundary issues such as the environment but local decisions should be made for detailed points of implementation [Paragraphs 2.69-2.71].
- Participants at a workshop identified problems with the one-size-fits-all approach. EU plant health legislation required northern EU countries to enforce legislation for prevention of pests that only survived in southern countries [Paragraph 2.154].

Review of the Balance of Competences between the United Kingdom and the European Union: Fisheries

- Maria Damanaki, EU Fisheries Commissioner said: ‘When I took office, I found a policy that was cumbersome and outdated. A policy that tried to prescribe everything top down starting from the mesh size Mr. Smith needs to use when he fishes for Dover sole off the coast of Cornwall’ [Paragraph 1.44].
- The Scottish Government said that fisheries management decisions are better made by those with practical experience and understanding of the fishery but there remains a role for the EU in providing high level objectives, the equality of a level playing field and a strong voice in international negotiations [Paragraph 2.69].

Review of the Balance of Competences between the United Kingdom and the European Union: Energy

- Centrica wrote: ‘[...] in general, EU competence should be framework setting, rather than determining the detail. For example, we believe it is right for the EU to agree a level of ambition on reducing carbon emissions, but right for Member States to develop specific policies to meet those targets’ [Paragraph 2.1.35].
- Energy UK said: ‘Energy UK members believe that it would be preferable to set a target for greenhouse gas reduction and to allow Member States flexibility in the extent to which they achieve this through energy efficiency or through other measures’. [Pararagraph 2.4.31]

Review of the Balance of Competences between the United Kingdom and the European Union: Financial Services and Free Movement of Capital

- Evidence implied that Single Market measures should focus on making domestic markets more contestable and open to new entrants from other Member States or from those using new technologies or business processes, rather than seeking to harmonise the rules of a large number of local markets with different market structures, presenting somewhat different risks [(Paragraph 3.139].
- Although there was broad consensus about the need for EU-level rules to underpin the Single Market in financial services and to have a financial stability objective in the wake of the crisis, evidence from stakeholders raised significant concerns regarding the recent pace, volume and focus of EU legislation, the failure to differentiate between different financial services sectors, the lack of proportionality, and insufficient recognition of the subsidiarity principle, especially in the retail sector (Executive Summary).

2.35 Further examples from across the Balance of Competences review are found in Appendix A. Open Europe cites a number of areas where it considers the EU to be making policies which ‘could clearly be sufficiently achieved by Member States:

- Working Time Directive controlling, inter alia, working hours of hospital doctors across Europe;
- Harmonisation of VAT levels on domestic gas and electricity, and of domestic water quality standards, in every EU state;
- Directive 2003/20/EC requiring children under 12 to have car safety seats in all countries;
- The blanket ban on traditional tungsten light bulbs in every EU country; and

- The Agency Workers Directive, giving agency workers in every EU country the same rights as full time workers after 12 weeks in the job'.⁵³
- 2.36 Some respondents pointed out that sometimes examples of legislation alleged to breach the principle of subsidiarity could instead be presented as breaching other principles. Emerson, based on an examination of the first two semesters of the Balance of Competences exercise notes that, '[i]t was pointed out that, in a number of cases, the underlying complaint was not so much subsidiarity as whether the proposal was necessary in the first place, questions of EU competence or the proportionality of the proposed measures. It was also noted that the decision on where competence lay was often a judgement call. And that it was often not clear where the balance of power lay in cases of shared competence'.⁵⁴ Others agreed that arguments about subsidiarity are often in effect disagreements with the substance of a proposal.⁵⁵
- 2.37 Some business representatives emphasised that stability, predictability and legal certainty were more important to them than subsidiarity; they considered there to be no intrinsic problem with legislation and standards as such.⁵⁶
- 2.38 In his January 2013 Bloomberg speech, the Prime Minister set out a number of principles, including that 'power must be able to flow back to Member States, not just away from them'.⁵⁷ The case study on Common Fisheries Policy reform below is an example where groups of Member States have been given greater freedom on how to implement EU policies locally.

Case Study: Regionalisation in the Common Fisheries Policy (CFP)

- Under the reformed Common Fisheries Policy (CFP), all the countries which fish a particular area (e.g. the North Sea) have been given increased responsibility to take joint decisions over how their shared fishery should be managed. Whilst still operating within an agreed EU framework, which establishes high level objectives and targets, the decisions on how those will be delivered in each regional area are now taken by those countries with a direct fishing interest.
- This is in contrast to the previous arrangement where there was a one-size-fits-all set of detailed rules and regulations for the whole EU. This meant that the same rules applied from Arctic to the Mediterranean and could not be amended quickly to reflect changing circumstances. The new system will mean more locally tailored fisheries management that is much more responsive to the need for change.
- Work is now underway in the new regional groups of Member States. This is currently focussed on designing how the new ban on discarding fish (another element of CFP reform) will be implemented in each region taking account of local needs.

This is an interesting example of subsidiarity in action. It is described in more detail from paragraph 2.67 in *Review of the Balance of Competences between the UK and the EU: Fisheries*.

⁵³ Open Europe, *The Case for Localism in Europe* (2011).

⁵⁴ *Record of 27 June 2014 stakeholder event, Emerging Themes*.

⁵⁵ Law Society and Law Society of Scotland, *submission of evidence; Record of 25 June 2014 stakeholder event Copenhagen*; and *Record of 27 June 2014 stakeholder event, Emerging Themes*.

⁵⁶ *Record of Meeting with Anders Ladefoged, Danish Confederation of Danish Industry (DI)*.

⁵⁷ Rt. Hon. David Cameron, *EU Speech at Bloomberg* (23 January 2013). Available at: <https://www.gov.uk/government/speeches/eu-speech-at-bloomberg>, accessed on 27 November 2014.

Evidence on the Clarity and Scope of Subsidiarity

- 2.39 Some respondents commented on the vagueness of the subsidiarity test described at 1.17 above, based on the wording of Article 5(3) on whether EU action is required, by examining whether (1) the objectives of the proposed action can be sufficiently achieved by the Member States; and (2) if not, whether the action can therefore, by reason of its scale or effects, be implemented more successfully by the EU.
- 2.40 For example, Wyatt argues that Commission proposals can always be framed so as to pass this test, resulting in it failing to effectively constrain EU action: ‘The principle of subsidiary is defined in a way which admits of more than one interpretation, and policy considerations and political judgment influence the way it is interpreted and applied in particular cases. These factors allow the EU institutions to present almost any proposal for EU wide action as having an objective which can be better achieved at EU level than at national level, and that is what they do. As regards internal market measures, it is argued that only EU harmonized rules can remove obstacles to cross border activities which result from differences between national laws. As regards other measures (such as environmental or social measures), it is argued that only EU action can guarantee higher standards in the Member States than currently prevail’.⁵⁸
- 2.41 This was echoed by a number of respondents, including COSLA, which considered it easy for a proposal to meet the test once any link to the internal market had been shown.⁵⁹
- 2.42 Geert De Baere also points out that there is a degree of overlap between the two parts of the subsidiarity test: ‘[. . .][G]iven that Union action is invariably tested against Union objectives, [. . .] the burden of proof for the Union is easily discharged and the protection offered by subsidiarity often suboptimal and ineffective. For example, once the Court of Justice has accepted that a certain measure is legitimately intended to improve the conditions for the establishment and functioning of the internal market [. . .], the step to accepting that the objective can be better attained at Union level is small indeed’.⁶⁰
- 2.43 Participants at an outreach event in Brussels noted that understanding and application of subsidiarity may vary as it is a word or concept that is not easily expressed or understood in all EU languages or political cultures.⁶¹ Similarly participants at a seminar in Dublin suggested that, whilst the concept is familiar in some countries, such as Germany, where decisions have to be made about the correct level (federal or state) in line with the constitution, other countries may find it harder to understand and apply it because of their lack of a written constitution, lack of familiarity with federalism or heavily centralised administration.⁶²
- 2.44 As explained at 1.38, many parliamentary chambers in EU Member States must object to a proposal on subsidiarity grounds before a ‘yellow’ or ‘orange card’ is triggered. Given this, several respondents considered a common definition or criteria for subsidiary would facilitate co-ordination among parliaments on their objections.⁶³ The European Commission in its evidence noted that it has published criteria for the consideration of subsidiarity and that it has always encouraged other institutions to use these same criteria.⁶⁴

⁵⁸ Wyatt, *submission of evidence*.

⁵⁹ Convention of Scottish Local Authorities, *submission of evidence*.

⁶⁰ Professor Geert De Baere, University of Leuven, *submission of evidence*.

⁶¹ *Record of 29 April 2014 stakeholder event, Brussels*.

⁶² *Record of 22 May 2014 stakeholder event, Dublin and; Record of 29 April 2014 stakeholder event, Brussels*.

⁶³ See, for example, Dr. Ozlem Ulgen, Birmingham City University, *submission of evidence*.

⁶⁴ European Commission, *Annual Report 2012 on Subsidiarity and Proportionality*. Available at: http://ec.europa.eu/smart-regulation/better_regulation/documents/2012_subsidarity_report_en.pdf

- 2.45 Other respondents however preferred a broad, non-specific definition which allowed national parliaments greater discretion to interpret subsidiarity. This is the UK Government's position. A number of national parliaments share this position, considering that they should be able to issue reasoned opinions on other grounds, such as for breach of legality or proportionality or when the wrong Treaty article is cited. As Dougan puts it, if subsidiarity is a procedural principle, whose contents are those expressed by national parliaments using the channels given to them, '[s]ubsidiarity therefore means whatever the national parliaments want it to mean and whatever political power their voice exerts upon the EU institutions'.⁶⁵
- 2.46 The subsidiarity principle applies to legislation in areas of shared or supporting competences but not when the area in question is one of exclusive EU competence. Some contest the rationale behind the exclusion of areas of exclusive EU competence from the scope of subsidiarity mechanisms in the Treaties. Barber, for example, considers that, where the EU has exclusive competence, it should be encouraged to defer as much as possible to Member States in those areas, and thus uphold the principle of subsidiarity. Barber notes that in areas of exclusive EU competence, the EU may authorise Member States to act.⁶⁶ Others were not convinced that this exclusion was significant in practice. For instance, the Senior European Experts Group pointed out, 'there are only five areas of exclusive competence (one of which does not currently affect the UK as we are not part of the eurozone) but 18 areas of shared or supporting competence, [and therefore] the application of subsidiarity is a significant issue in large parts of EU activity, including the Single Market, justice and home affairs, the environment and social policy'.⁶⁷
- 2.47 Much of the technical detail of EU legislation is specified in secondary legislation, in the form of delegated acts and implementing acts (formerly known as the 'comitology' system because they were adopted following Commission consultation with committees of experts from Member States). The Lisbon Treaty changed these procedures, creating delegated acts, which amend or supplement nonessential elements of basic legislative acts, and implementing acts, which are more technical and individual measures. The Commission proposes and adopts delegated acts, with a free hand on who to consult. The Commission proposes draft measures and must consult committees of national experts. Such acts make up a very large proportion of EU legislation.
- 2.48 Harris noted that the national parliament subsidiarity check only applies to 'legislative acts' but concludes that excluding delegated and implementing acts is appropriate given the potential overload that their inclusion would create for national parliaments in respect of low risk measures, whose parent legislation should have gone through some form of subsidiarity assessment.⁶⁸
- 2.49 However other respondents were more concerned about these rules. The Committee of the Regions announced in its 2014 Work Programme its intention to look into certain of these acts. Participants in the Brussels seminar felt that the increasing use of delegated acts and European Agencies did not bode well for the principle of subsidiarity, as there were fewer channels to prevent the misuse of the principles.⁶⁹

⁶⁵ M. Dougan and T. Horsley, *submission of evidence*.

⁶⁶ Nick Barber, *submission of evidence*.

⁶⁷ Senior European Experts Group, *submission of evidence*.

⁶⁸ Dr Joanne Hunt, Cardiff University, *submission of evidence*.

⁶⁹ *Record of 29 April 2014 stakeholder event, Brussels*.

- 2.50 As NATS (formerly National Air Traffic Services) points out, apparently technical measures can result in very significant implementation costs running into the tens of millions of pounds, and should therefore be considered carefully in light of the principles of subsidiarity and proportionality. NATS therefore proposes giving the Commission an explicit duty to ensure that draft delegated and implementing acts developed by specialised agencies or subcontractors are proportionate before circulating them to Member States and industry.⁷⁰
- 2.51 The Convention of Scottish Local Authorities (COSLA) also identifies these as an emerging source of ‘great concern’ for proportionality, since in practice the new delegated rules give the Commission significant powers to legislate in detail beyond what the legislator (European Parliament and Council) have agreed to. The Commission’s hand is further strengthened as the European Parliament and Council have only 8 weeks to either approve or reject such delegated acts as a whole. COSLA would like to see the establishment of general criteria or a checklist that the Commission needs to act on before deciding if a matter can be left to a delegated act instead of being addressed in the main body of EU legislation.⁷¹
- 2.52 The Danish Parliament’s European Affairs Committee called for national parliaments to be given a power to revoke the use of a delegated act.⁷² Whilst remaining sensitive to the need to avoid overburdening Parliament, the UK Government continues to work with Parliament to improve the current scrutiny system and ensure appropriate scrutiny of delegated acts occurs.

C. Evidence on Proportionality in Practice

- 2.53 Much of the evidence above relates to proportionality as well as subsidiarity. This section relates to evidence which is purely about proportionality. In general, the evidence received on proportionality showed a general support for the principle as a core component of good regulation, found in many different legal systems. Lawyers commented that proportionality is one way of resolving conflicts among different Treaty objectives, since there is no hierarchy or ranking of different objectives in the Treaties, and some must be pursued concurrently.⁷³
- 2.54 Concerns about lack of proportionality were frequently raised in respect of particular areas of competence across the Balance of Competences review. For example, many respondents to the Financial Services and Free Movement of Capital Report considered that EU policy-making failed to consider the principle of proportionality adequately and highlighted individual pieces of legislation considered unnecessary or disproportionate in their impact.⁷⁴

⁷⁰ National Air Traffic Services, *submission of evidence*.

⁷¹ COSLA, *submission of evidence*.

⁷² European Parliament, European Affairs Committee, *23 Recommendations for Changing the Role of National Parliaments in a changing European Governance* (2014).

⁷³ De Baere, *submission of evidence*.

⁷⁴ HMG, *The Balance of Competences: Single Market: Financial Services and the Free Movement of Capital*, paragraphs 3.149-3.151.

Proportionality in Environment and Climate Change

The Balance of Competences Report on the Environment and Climate Change highlighted two examples of EU legislation which are seen as too prescriptive and not sufficiently proportionate or risk-based:

Case study: Habitats Directive

The Habitats Directive requires households to go through the same procedures as a major developer and costs of compliance for firms can be highly disproportionate (for example, protecting 23 newts onsite can cost £200,000-300,000 according to evidence from the Home Builders Federation.)

HMG, *Review of the Balance of Competences between the United Kingdom and the European Union: Environment and Climate Change* (2014) para 2.29.

Case Study: Waste Framework

In 2012, the European Commission held a consultation to find out what the most burdensome EU legislation was for SMEs. One of the areas highlighted in this consultation was legislation on waste management. The FSB argued that the European Waste Catalogue established by European Commission Decision 2000/532/EC places a significant burden on small firms. It also said that requirements to register as a waste carrier and to complete a Waste Transfer Note place a high level of compliance burden on small firms which is disproportionate to the environmental risk they pose. The Prime Minister's Business Taskforce on EU Regulation called on the EU to remove unnecessary rules on SMEs transporting small amounts of waste, which in its view constitute a barrier to businesses expanding.

HMG, *Review of The Balance of Competences between the UK and the EU: Environment and Climate Change* (2014), paragraph 2.47

Case Study: Organs, Blood, Tissues and Cells

EU directives on blood, tissues and cells, and organs set minimum quality and safety standards across the EU.

Respondents to the Call for Evidence on the Balance of Competences in Health generally welcomed these directives. In the UK, the Human Tissue Authority said that:-

'The introduction of common standards across the EU enables a culture of mutual recognition between Member States, which in turn should facilitate and ease the movement of tissues, cells and organs across Member States. For example, if tissues or cells are imported to the UK from another member state an import licence is not required as the tissues/cells will already have been assessed as meeting the regulatory requirements by the Competent Authority (CA) of another Member State'.

The Government's view is that the implementation of the Directive was proportionate and appropriate in relation to the UK domestic system. For example, the directives require tissue storage facilities to be licensed rather than each donating hospital. As well as carrying out public consultations on proposals for implementation, including a draft of the proposed implementing legislation, the Department of Health worked closely with key stakeholders such as NHS Blood and Transplant and the Human Tissue Authority in working groups to develop the detail of the implementation.

HMG, *The Balance of Competences between the UK and the EU: Health* (2013), paragraph 3.5 [3.5.1, 3.5.8]

Case Study: European Legislation which Created a Global Brand

The main European framework covering collective investment schemes suitable for retail investors is called the UCITS (Undertakings for Collective Investment in Transferable Securities) Directive.

The UCITS Directive was cited as an example of well-designed legislation which delivered clear benefits. This Directive is the main European framework covering collective investment schemes that are suitable for retail investors, and was generally well-regarded for giving consumers access to high-quality, consistent investments and for being regulated to a high standard. As a result, UCITS can therefore be seen as a successful example of EU legislation that adheres to the principles of subsidiarity and proportionality notably by creating a global brand at an international level that would have been far more difficult, if not impossible, at a national level and is pro-trade and pro-competition.

HMG, *Review of the Balance of Competences: Financial Services and the Free Movement of Capital*, paragraph 3.145, 2014.

Case Study: Olive Oil Jugs in Restaurants

The Commission proposed a ban on reusable olive oil jugs in restaurants. This encountered widespread opposition, including on grounds of proportionality, and was then withdrawn.

The Senior European Experts suggested that this example showed that the Commission's internal procedures were not working effectively. Others considered the impact that lobbying had had on the decision*.

* The Daily Telegraph, *The Great Olive Oil Farce* (2013). Available at: www.telegraph.co.uk/foodanddrink/foodanddrinknews/10080827/The-great-olive-oil-farce.html accessed on 13 December 2014.

Case Study: Alternative Investment Fund Managers Directive (AIFMD)

The Alternative Investment Fund Managers Directive (AIFMD) was cited by several respondents to the Financial Services and Free Movement of Capital Report as an example of EU legislation which failed to consider the principle of proportionality. They considered it to be disproportionate in its impact and coverage and without clear cross-border benefits which would justify its introduction.

The Commission proposed the AIFMD in 2009 in response to the financial crisis, describing it as an attempt to create a comprehensive framework for the regulation and supervision of the alternative fund industry.

It was published without pre-consultation or discussion with expert groups and was viewed by a number of respondents as exhibiting significant shortcomings as regards scope and proportionality. It was seen as a one size fits all approach.

Many firms had to make significant and costly changes to process and procedures to meet the AIFMD requirements. Standard Life commented that it created, 'a regulatory environment that covers many product types in which no issues of consumer detriment occurred', adding that, '[i]t is not obvious that the additional requirements will bring improved customer protection to investors in investment trusts'.

The City of London Law Society (CLLS) commented that, while the de Larosière report found that the hedge fund industry did not cause the financial crisis, the Directive imposed a costly regulatory structure that would be proportionate only if it had. The BVCA commented that, 'Efforts which would otherwise be focused on raising funds and investing those funds in the real economy are instead being diverted to satisfy administrative arrangements which will offer little (if any) increase in investor protection'.

The CLLS expressed concerns that a rushed process in putting together and negotiating the Directive resulted in poorly drafted legislation with certain key concepts left undefined. It noted that a survey of asset managers published by Deloitte in June 2012 found that 72% of respondents viewed the AIFMD as a threat to their business and 68% suggested that the AIFMD would reduce the competitiveness of the funds industry in Europe and lead to fewer non-EU managers operating there, putting at risk more than 100,000 jobs at a cost to the economy of some €21.5bn.

Problems with the AIFMD's broad approach were also recognised in other Member States. A senior official in the Dutch Financial Supervisory Authority commented that firms in the Netherlands were struggling to implement AIFMD, mostly because it applied a single set of rules onto a very diverse set of fund managers.

HMG, *Review of the Balance of Competences: Financial Services and Free Movement of Capital* (2014), paragraph 3.149 and text box page 80.

As well as the subsidiarity issues discussed above, the Working Time Directive also raises proportionality concerns. The Social and Employment Policy Balance of Competences report noted that 'two pieces of employment legislation [...] consistently raised as being the most burdensome in this and other commentaries are the Working Time and Temporary Agency Workers Directives⁷⁵'. Evidence submitted on behalf of Fresh Start, argues that (based on Government figures) over two-thirds of the annual cost to business from EU regulation comes from the WTD and the Temporary Agency Workers Directive⁷⁶. Whilst respondents noted some benefits from the WTD, they were generally considered to be outweighed by the costs and loss of flexibility.⁷⁷

⁷⁵ HMG, *Review of the Balance of Competences between the UK and EU: Social and Employment*, 2014.

⁷⁶ *Idem*.

⁷⁷ *Idem*, paras. 3.70-3.75

- 2.55 Many commentators considered that many proposals criticised on subsidiarity grounds could better be challenged on grounds of proportionality or better regulation. Emerson, for example, stated that many criticisms of EU policies were not so much about subsidiarity as ‘better regulation’. ‘Efficiency of specific actions appears as the most recurrent issue, rather than questioning whether there was a case for such actions to have been undertaken at the EU level’. He argued that absurd micro-regulation could be attacked on grounds of common sense, was becoming rarer and that such proposals were more quickly dropped by the institutions. He considers that the REACH Regulation’s burdens on SMEs breach proportionality rather than subsidiarity, arguing for stronger impact assessments both at the proposal stage and after adoption of legislation. In fast-moving areas of technological development such as telecoms, he argues that the issue is more about regulatory quality and an ongoing process of review and updating, as in the Commission’s REFIT programme described in the text box on Recent Developments in EU Better Regulation below.⁷⁸
- 2.56 Further evidence relating to proportionality in practice is found in Appendix A. Both proportionality and subsidiarity are closely related to the UK’s better regulation agenda.

UK Government Approach to Better Regulation

The UK Government view is that both subsidiarity (the most appropriate level for taking action) and proportionality (action being no more than what is required to achieve the desired objective) are important aspects of its better EU regulation agenda, where the UK wants to stop unnecessary costs being imposed on business, particularly small businesses.

The need to minimise unnecessary burdens on business, particular SMEs, was a constant theme in many of the Balance of Competences reports.

EU Business Taskforce

In June 2013, the Prime Minister invited a taskforce of six business leaders to look at reforms to European rules, regulations and practices that would make the most impact on British businesses. Its report drew on evidence from over 100 businesses and business groups from across Europe, and proposed the COMPETE principles below as a filter for all new EU regulation to ensure amongst other things its proportionality:

- Competitiveness test;
- One-in, One-out;
- Measure impacts;
- Proportionate rules;
- Exemptions and lighter regimes;
- Target for burden reduction; and
- Evaluate and Enforce Proportionate rules.

The report recommended that:

- The European Commission should take a risk-based and proportionate approach when developing new proposals, drawing on objective scientific advice; and
- The European Commission should bring forward clear guidance as soon as possible after legislation has been agreed, where this would help businesses comply with EU legislation in the least burdensome way.

⁷⁸ Emerson, *submission of evidence*.

Recent Developments in EU Better Regulation

Report of the Stoiber Group

- The Commission set up a High Level Group on Administrative Burdens (also known as the Stoiber Group after its Chairman, former Bavarian PM, Dr Edmund Stoiber) in 2007 to advise the Commission on how it could reduce administrative burdens derived from EU legislation.*
- The Stoiber Group's mandate ended at the end of September 2014. It presented its Final Report to then Commission President Barroso at a public conference in Brussels on 14 October 2014. The report contained a set of recommendations which reflected the COMPETE principles from the UK Business Taskforce report set out above. Notably this includes recommendations calling on the new Commission to:
 - Set a net target for reducing EU regulatory costs;
 - Introduce a system of offsetting new burdens on business by removing existing burdens (i.e. a one-in, one-out system);
 - Exempt small and microbusinesses from EU obligations where appropriate;
 - Improve consultation on draft legislation and draft impact assessments; and
 - Create an independent body to scrutinise Commission impact assessments.
- The UK Government has welcomed the *Stoiber Report*.

REFIT Programme

- In December 2012, the Commission announced the launch of a major regulatory fitness ('REFIT') programme and unveiled a detailed plan in October 2013 which sets out more than 100 actions.
- The UK Government welcomes the commitments to:
 - Reducing EU regulatory burdens on business;
 - Extending the use of evaluations of existing legislation;
 - Introducing a two-page summary for Commission impact assessments; and
 - Not to go ahead with plans for new unnecessary health and safety measures for hairdressers and in the area of ergonomics, and to consider withdrawing its proposal for the Soil Framework Directive.

D. Institutional Issues Related to Subsidiarity and Proportionality

Introduction

- 2.57 As set out in Chapter One, there is a role for national and sub-national authorities in Member States, the European Commission, the ECJ, the Council of the EU, the European Parliament and national parliaments, consultative bodies such as the Committee of the Regions and the European Economic and Social Committee, as well as business groups and civil society. The Protocol on the application of subsidiarity and proportionality requires the EU institutions to consult on their legislative proposals widely, to justify them with regard to proportionality and subsidiarity and to take into account the views of national parliaments. This evidence brings out opinions as to which actor(s) are likely to be most accessible or amenable to stakeholder views and to have the right skills, interests and incentives to uphold subsidiarity and proportionality effectively. As one observer noted, while there are on paper many different mechanisms for policing subsidiarity, in practice ‘how well these work will depend on how effectively actors are engaging with these structures, and their capacity and willingness to learn from the exchanges that take place within them’.⁷⁹
- 2.58 A range of views were expressed on these institutional questions. Dr Joanne Hunt considers that, ‘[o]n the whole, in recent years subsidiarity and proportionality have become rooted in the legal and political culture of the EU and its governance structures. This has been reinforced through the EU’s engagement with an agenda for ‘Smart Regulation’.⁸⁰ Others consider that the EU institutions pay only lip service to subsidiarity and better regulation, preferring harmonisation.⁸¹ The European Parliament in its most recent resolution (4 February 2014) on EU Regulatory Fitness and Subsidiarity and Proportionality covering the Commission’s 19th report on Better Lawmaking was quite critical of the respect for subsidiarity and proportionality, ‘express[ing] its disappointment once more that [...] criticisms [by the Impact Assessment Board and by national parliaments, finding subsidiarity and proportionality] inadequately addressed in Commission impact assessments have been repeated’.⁸²
- 2.59 The mechanisms and role of actors in upholding proportionality are somewhat different to those for subsidiarity. As Emiliou notes, ‘(P)roportionality [is] a principle stated in the Treaty [...], [which] is designed to apply primarily at the legislative rather than the implementation stage’. Proportionality therefore should be considered at the proposal stage, and in the impact assessment process, described from 1.24 above. One writer however considered that these references in the Treaty to be of limited value: ‘article 5 TEU however is not so much a codification of the case law as the addition of a procedural test in the legislative context and even in that setting its likely impact appears limited or at least secondary to that of the principle of subsidiarity’.⁸³
- 2.60 There was little evidence on the role of the EU institutions in specifically upholding proportionality. A number of respondents questioned the lack of mechanisms available to the EU institutions and national parliaments to protect proportionality, for example, it not being expressly covered by the ‘yellow card’ mechanism as described in the section on

⁷⁹ Hunt, *submission of evidence*.

⁸⁰ *Idem*.

⁸¹ Tannock and Kamall, *submission of evidence*.

⁸² Regulation 2013/2077(INI) of the European Parliament on EU Regulatory Fitness and Subsidiarity and Proportionality, 2011.

⁸³ Wolf Saunter, *Proportionality in EU law – a Balancing Act* (2013)

subsidiarity above, including some of the challenges for national parliaments to analyse, co-ordinate and respond within the eight week deadline.

2.61 The lack of mechanisms to assess the cumulative impact of regulation in a sector was also highlighted. Local authorities expressed concerns about the pace of legislative change, questioning whether the interactions and overlapping obligations among different areas of competence were properly considered to ensure sensible outcomes and manageable burdens on local authorities.⁸⁴ The concern about ensuring the proportionality of all regulation in an area was also raised by business groups and financial services bodies, for example in the Balances of Competences review Free Movement of Capital report, leading to the suggestion that the Commission develop cumulative impact assessments to look at the total impact on a sector.⁸⁵

The Role of the European Commission

2.62 A number of respondents thought culture change was needed for the Commission to engage more seriously when subsidiarity concerns were raised. There was some concern about the Commission's responses to reasoned opinions and 'yellow cards', which some thought too brief without providing additional evidence, and in particular, many considered it regrettable that the Commission continued with the EPPO proposal unchanged despite the 'yellow card'.⁸⁶ The UK Government has said that: 'There is a strong case to be made that the Commission has failed to take sufficient note of the views of national parliaments as expressed in opinions and reasoned opinions, and has been slow in formally replying to national parliaments' communications'.⁸⁷

2.63 There was some criticism that the Commission's approach implied that the burden of proof is on the national parliaments to show that a proposal does not comply with subsidiarity, when the Treaties require the Commission to show that a proposal is compliant.⁸⁸

2.64 The participants in the Dublin seminar noted that the current institutional structures of the EU – the size of the College of Commissioners, the lack of accountability among MEPs, the European Council's ability to direct the Commission – inhibit effective application of subsidiarity and proportionality.⁸⁹ Some considered it only natural for the Commission to defend its proposals, and noted that there was evidence of the Commission amending or withdrawing proposals to take into account reasoned opinions even where they fell below the 'yellow card' threshold, such as a 2012 directive on public procurement.⁹⁰

2.65 Others were sympathetic to the position that the Commission was in, arguing that it was impossible for it to police subsidiarity effectively, given its primary right of legislative initiative.⁹¹ The Senior European Experts Group commented that, '[w]hile it is to the

⁸⁴ COSLA, *submission of evidence*.

⁸⁵ HMG, *The Balance of Competences Review: Single Market – Financial Services and the Free Movement of Capital*, 2014, para 3.146 and para 4.59,

⁸⁶ For example, Fresh Start, *Mandate for Reform* (2013).

⁸⁷ Government Response to the House of Lords European Union Committee Report HL 151 of Session 2013-14 *The Role of National Parliaments in the European Union*, July 2014.

⁸⁸ Wyatt, *submission of evidence*.

⁸⁹ *Record of 22 May 2014 stakeholder event, Dublin*.

⁹⁰ *Record of 29 April 2014 stakeholder event, Brussels*; Electoral Reform Society, *submission of evidence*.

⁹¹ *Record of 27 June 2014 stakeholder event, Emerging Themes*. The participants in the Dublin outreach event argued that the Commission's own tests of proportionality and subsidiarity were hardly effective, considering it 'impossible to imagine the Commission annulling its own proposal on the grounds of subsidiarity or proportionality'. See also Professor Derrick Wyatt, *submission of evidence*.

Commission's credit that impact assessments are scrutinised independently of those who draft them, the [impact] A[ssessment] B[oard]'s credibility is limited by the fact that it is made up of other Commission officials and that no statistics are published of the number of legislative proposals rejected on grounds of subsidiarity'.⁹²

- 2.66 Some stakeholders pointed out that the Commission structure gave individual Commissioners and Commission officials greater incentives to produce legislative proposals than to halt them, and accordingly think tank the Centre for European Policy Studies (CEPS) advised restructuring of the Commission, to reduce these incentives (the 2009-14 Commission had 33 directorates-general, 11 services and 28 Commissioners (one per Member State)).⁹³ The 2014 Commission has a different structure from that of its predecessors, with Commissioners working to Vice-Presidents within project teams aligned to a number of priorities.
- 2.67 Logically, if subsidiarity is to be effective, it must mean that at least some regulations which are proposed at EU level will not be agreed, on the grounds that the area can be better regulated at national or subnational level. Though attempts to measure the volume and impact of EU legislation raise difficult methodological questions, one think tank, CEPS, cites evidence of a quantitative reduction in both legislative and non-legislative proposals from the Commission during Barroso's second term as President.⁹⁴ The Law Society and Law Society of Scotland observed that 'there is certainly evidence of sustained attempts by the Commission to engage with subsidiarity concerns in legislative design, though individual outcomes may not always be convincing to all'.⁹⁵
- 2.68 Participants in the Brussels seminar considered that more reference to proportionality in the drafting process could improve legislation.⁹⁶ The European Parliament in its 2014 resolution on better law-making, called on the Commission 'to step up its review of the application of the principle of proportionality, especially with regard to the use of Articles 290 and 291 TFEU on delegated and implementing acts'.⁹⁷

The Role of the ECJ

- 2.69 There was considerable evidence on the role of the ECJ in policing subsidiarity. For example, the Law Societies commented in their evidence: 'There is very little case law on subsidiarity. This is unsurprising as subsidiarity relates to allocation of power and may therefore be viewed as more overtly political. It does not lend itself to judicial review as readily as proportionality [...] The ECJ has seemed reluctant to consider it even when brought [as] a specific ground. ...Although, in some areas it is possible to carry out an objective assessment, this will not always be possible, even if the decision-makers are acting in good faith'.⁹⁸

⁹² Senior European Experts Group, *submission of evidence*.

⁹³ Sonia Piedrafita and Steven Blockmans, *Shifting EU Institutional Reform into High Gear: Report of the CEPS High-Level Group* (2014).

⁹⁴ House of Commons, House of Commons Library, *How much legislation comes from Europe?* Research Paper 10/62, (13 October 2010).

⁹⁵ Law Society and Law Society of Scotland, *submission of evidence*.

⁹⁶ *Record of 29 April 2014 stakeholder event, Brussels*.

⁹⁷ European Parliament resolution of 4 February 2014 on EU Regulatory Fitness and Subsidiarity and Proportionality – 19th report on Better Lawmaking covering the year 2011 (2013/2077(INI)). Available at: www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0061+0+DOC+XML+V0//EN

⁹⁸ Law Society and Law Society of Scotland *submission of evidence*.

- 2.70 Similarly Barber writes that, ‘The subsidiarity test requires difficult technical and political assessments to be made. First, the court must reach a judgment about the extent to which the social and economic effects of an activity cross Member States boundaries. Secondly, it must then undertake a political assessment of whether the effects on other States justify action at a Community level: a question which would involve both an assessment of the seriousness of the cross-border impact, and, additionally, the extent to which Member States could be relied upon to pursue Community objectives in this area. The first question raises complex technical issues: the court would, probably, be presented with a range of conflicting expert reports purporting to resolve the issue, from the Commission and from the Member States. The second question requires the court to enter an area of political debate in which there are few widely supported principles that the judges could adopt as guides. The balance of regional and central power, in particular, the price that is worth paying for the benefits of local control, is hardly a question a court ought be asked to answer’.⁹⁹
- 2.71 Barber also notes that there is a ‘less charitable explanation’ for the ECJ’s failure to make use of subsidiarity, which is that the principle runs against the spirit of the court, given that it has shown itself capable of complex economic analysis when passing judgement in economic freedom cases.¹⁰⁰ He cites other academics who record that federal courts, dependent on the centre for their power and prestige, frequently favour the centre over the regions, and concludes that: ‘[I]t is unsurprising that the [ECJ] has had little use for subsidiarity, a principle that purports to protect Member States from the centralisation of power, and it is unlikely that this attitude will change in the near future’.¹⁰¹
- 2.72 Tridimas similarly observes that the ECJ has a limited interest in upholding subsidiarity noting that it tends to construe derogations broadly: ‘The broad ethos of the court is to favour action at the Community level over action at the Member State level [...] It has proved difficult for the ECJ to transform itself from a force for integration into a body that can impartially adjudicate between Member States and Community Institutions’.¹⁰²
- 2.73 Tridimas also expressed doubt as to whether the ECJ would be able to change its approach, referring to several factors:
- Choices about the correct level for decision-making are inherently political, and should be taken by (elected) political actors rather than judges;
 - Litigation is unlikely to be a particularly effective way to ensure respect for subsidiarity as it depends on the willing and well-funded litigants to bring challenges;
 - The complexity of the EU structures, with multiple actors, with different roles and checks and balances, to those found at national level; and
 - The need to look beyond a purely legal perspective to behaviour.¹⁰³

⁹⁹ Barber, *submission of evidence*.

¹⁰⁰ *Idem*.

¹⁰¹ *Idem*.

¹⁰² Takis Tridimas, *submission of evidence*.

¹⁰³ *Idem*.

- 2.74 Others agree that the ECJ's role with respect to subsidiarity is unlikely to be much more developed and therefore recommend greater focus on political safeguards. For example, Schütze, comments 'The principle of subsidiarity still lacks clear judicial contours; and the only way that it seems to be enforceable at the moment is via the political safeguard of the yellow card mechanism'. This is also considered more appropriate given the inherently political nature of the decision about the appropriate level for decision-making.¹⁰⁴
- 2.75 By contrast, both the ECJ and national courts play a very significant role in upholding proportionality, which is cited as a ground of challenge in many cases annually. Specifically with regard to the ECJ, a number of issues were raised.
- 2.76 Legal practitioners found it difficult to anticipate how court rulings would go, and hence to advise clients. Whilst recognising that the intensity of judicial review would vary depending on the type of case, some suggested that it would be possible to increase clarity and transparency by setting out a guide to the level of review in different circumstances.¹⁰⁵
- 2.77 Legal authorities often observe that the Court of Justice reviews more closely Member State action on proportionality grounds than EU actors. However, others noted that this was not comparing like with like: typically, in these cases, Member States were attempting to defend a prima facie breach of an EU principle, and it was understandable and indeed correct for the Court to be sceptical.¹⁰⁶ Equally, some respected the need for some caution by the ECJ in using proportionality to annul EU legislation, to avoid too easily substituting its judgment for the political one made by the legislator.¹⁰⁷

The Role of the Council

- 2.78 Member State governments have the opportunity to raise subsidiarity and proportionality concerns on proposals throughout the legislative process, and frequently do. They can also pass on parliamentary concerns about subsidiarity and proportionality during the negotiation process. However, some evidence pointed to reasons why some Member States may not always raise their concerns. For example, a participant in the Bath seminar noted that Member State authorities had limited resources and could not catch every problematic proposal at an early stage, given the volume of proposals. And Wyatt gives some reasons (political expediency, path of least resistance, support for the policy behind a proposal) why Member States might choose to either support the proposal, or to minimise problematic aspects during negotiations in Council, as opposed to objecting on subsidiarity grounds to a proposal.¹⁰⁸
- 2.79 In addition to engaging during the proposal negotiation phase, one participant in the Brussels seminar called for Member States to engage on subsidiarity at an early stage, by engaging more on the Commission's work plan, and holding the Commission to account more on the Council's priorities.¹⁰⁹ The Government agrees with this suggestion and is encouraged by the consultation process which the new Commission has undertaken with Member States, through the Council, on the annual work programme. In the Government's analysis of the Commission Work Programme, which is presented to Parliament on an annual basis, it considers whether each proposal respects the principle of subsidiarity.

¹⁰⁴ *Record of 7 May 2014 stakeholder event, FCO London.*

¹⁰⁵ *Idem.*

¹⁰⁶ *Idem.*

¹⁰⁷ *Idem.*

¹⁰⁸ Wyatt, *submission of evidence.*

¹⁰⁹ *Record of 29 April 2014 stakeholder event, Brussels, Record of 27 June 2014 stakeholder event, Emerging Themes.*

The Role of the European Council

2.80 The European Council in June 2014 set out a Strategic Agenda of key priorities for the next five years for the EU which it invited ‘the EU institutions and the Member States to fully implement ... in their work’.¹¹⁰ It emphasised subsidiarity and proportionality:

In line with the principles of subsidiarity and proportionality, the Union must concentrate its action on areas where it makes a real difference. It should refrain from taking action when member states can better achieve the same objectives. The credibility of the Union depends on its ability to ensure adequate follow-up on decisions and commitments. This requires strong and credible institutions, but will also benefit from closer involvement of national parliaments. Above all, the emphasis should be on concrete results [...].¹¹¹

The Role of the European Parliament, EESC and CoR

- 2.81 Relatively little evidence was received on the effectiveness of the European Parliament, European Economic and Social Committee (EESC) and Committee of the Regions (CoR) in protecting subsidiarity and proportionality. This may be because of the lack of visible action by these institutions on their role during negotiations or in bringing legal challenges post-adoption. The Commission drew attention in its 2012 report on subsidiarity to recent changes in European Parliament procedures to improve its ability to comment on subsidiarity. One respondent observed that that European Parliament’s Legal Committee has a role in deciding what constitutes a ‘Reasoned Opinion’ and suggested that it would be increasingly likely to side with a national parliament, over the Commission, because MEPs are sensitive to the opinions of national governments and parliaments.¹¹²
- 2.82 Some participants at the Brussels seminar expressed the view that, while it has an important role to play, in practice the CoR has not been particularly active on subsidiarity and its reports sometimes come out too late to be of any use. At the same event, participants described it as being ineffective in improving coordination among regional authorities. COSLA pointed out that the CoR had not yet taken advantage of its right to challenge legislation for breach of subsidiarity.¹¹³ COSLA suggests that the diversity of its membership (from small French ‘parish’ councillors to German Land Presidents) and the fact that this power is regarded as a politically charged one and a last resort mechanism, makes it difficult to establish broad consensus to bring a challenge. It also considers that the CoR’s main outputs – Opinions – tend to be too general in scope, and highlights that its internal structures mean that most of the subsidiarity work is carried out externally and through the Subsidiarity Monitoring Network.¹¹⁴
- 2.83 More generally, the Electoral Reform Society was sceptical about the potential for EU institutions to enforce subsidiarity, and discussed the role of the European Parliament: ‘The EU institutions tend to culturally lean towards a pro-European frame of thought. It is, to some extent, inevitable, that they will be highly pro-European as naturally, those who work in the institutions are likely to think more positively of them and their work. This is true of MEPs as well, with MEPs often representing the most federalist wing of their party. This means that when subsidiarity and proportionality is interpreted in the European institutions it is often interpreted in such a way as to give the broadest possible remit to

¹¹⁰ European Council, *Conclusions* (June 2014). Available at: www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/143478.pdf, accessed on 27 November 2014.

¹¹¹ *Idem*.

¹¹² *Record of 29 April 2014 stakeholder event, Brussels*.

¹¹³ COSLA, *submission of evidence*.

¹¹⁴ COSLA, *submission of evidence*.

the EU'.¹¹⁵ Wyatt similarly considers that 'perhaps the staunchest opponent (in practice, and rhetoric apart) of subsidiarity is the European Parliament. For MEPs participation in a legislative process which is seen to produce European wide rules is the yardstick by which their political and constitutional legitimacy is to be measured. Relatively few MEPs have believed that political advantage was to be derived from preventing or curbing, rather than promoting, the adoption of European wide legislation....[]n the main, to date, the European Parliament has seen subsidiarity as requiring an explanation for a measure that the majority is minded to adopt, rather than raising a serious question as to whether that measure should be adopted'.¹¹⁶

- 2.84 The European Parliament's strong role in trilogues (negotiations among the Commission, Council and European Parliament on draft legislation), and the prevalence of first reading deals on EU legislation were raised in a number of examples of legislation which was considered problematic by respondents to other Balance of Competences reports, described further below.

The Role of National Parliaments

- 2.85 National parliaments were a focus of much of the evidence, in line with their role as 'guardians of subsidiarity', as well as an important link to citizens. The UK Parliament's European scrutiny committees have been very active on the issue of subsidiarity, including, in the case of the House of Lords European Union Committee, through researching and producing a report, *The Role of National Parliaments in the European Union*.¹¹⁷ This activity is mirrored by many of their European counterparts, particularly as they seek to make best use of their new powers under the Lisbon Treaty. Some national parliamentarians are unhappy that the effort put into reasoned opinions does not yield greater results, and many Speakers of parliaments at a recent event wished for fuller and better quality replies from the Commission to national parliaments' contributions.¹¹⁸
- 2.86 The European Parliament in its latest resolution on subsidiarity and proportionality considered the current procedures did not help with the EU's democratic legitimacy, considering 'that the pressure on time and resources faced by national parliaments when responding to draft legislation contributes to the perceived 'democratic deficit' within the EU'.¹¹⁹
- 2.87 The academic literature on this subject presents a mixed picture. Some, such as De Wilde, consider that the subsidiarity mechanisms are a distraction from national parliaments' core functions, that they muddle lines of accountability and representative democracy, and that the results are not proportionate to the investment of time and energy by national parliaments.¹²⁰ Others, such as Ian Cooper, are more positive about the prospects for greater democratic accountability in the EU as a result of the new direct

¹¹⁵ Electoral Reform Society, *submission of evidence*.

¹¹⁶ Wyatt, *submission of evidence*.

¹¹⁷ House of Lords European Union Committee, *The Role of National Parliaments in the European Union*, 9th Report of the Session 2013-14(2014)

¹¹⁸ See for example Stech, Chairman of Czech Senate, cited in Lithuanian Parliament (Seimas) Final conference note, and note from Conference of speakers, Lithuania

¹¹⁹ European Parliament, *EU regulatory fitness and subsidiarity and proportionality – better lawmaking 2013/2077(INI)* (2014). Available at: www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0061+0+DOC+XML+V0//EN, accessed on 27 November 2014.

¹²⁰ Peter De Wilde, *Peter Why the Early Warning Mechanism does not Alleviate the Democratic Deficit* (2012).

role of national parliaments.¹²¹ Some suggestions to strengthen subsidiarity procedures are considered in more detail in Chapter Three.

- 2.88 Commentators note that in practice most of the controls on proportionality are post-adoption and carried out by courts, both the ECJ and national courts. The main question is therefore to what extent it should be controlled by non-judicial actors, such as the EU institutions and national parliaments. Given the extent of the detailed case-law on proportionality, some were sceptical that the principle could or should be developed by non-judicial actors. Some considered political control was less necessary than in the case of subsidiarity as the ECJ played a stronger role.¹²² For instance, Wyatt comments that, 'The content of the principle in general and as it applies case to case is in the hands of the European Court of Justice and of national courts. It falls to national courts to apply the principle consistently with EU law in those cases which fall within the scope of EU law. Whatever the merits or demerits of judicial application of the principle of proportionality in EU law, it is not feasible to attempt to 'reform' current judicial practice by soft or hard law devices'.¹²³
- 2.89 However others considered this largely judicial control to be a 'problem,' and felt that respect for proportionality could be improved by the various EU institutions taking it more seriously before adoption.¹²⁴

Impact Assessments

- 2.90 Considerable evidence was provided with respect to this report and the other reports in the Balance of Competences Review expressing concerns about the impact assessment process. Some examples are detailed below.
- 2.91 The House of Lords EU Committee published a 2010 report on Impact Assessments in the EU: Room for Improvement?¹²⁵ The report notes that 'almost all [the] witnesses [to its inquiry] suggested that the European Parliament and the Council are not taking impact assessment as seriously as they should'.¹²⁶ Under the 2005 Common Approach to Impact Assessment, the Council and EP agreed with the Commission some basic principles for impact assessment throughout the legislative process, including that the Council and EP would carry out assessments of the impact of their substantive amendments to proposals during the negotiation process. While most evidence focused on the importance of Impact Assessments on Commission proposals some representatives at the Brussels event highlighted the importance of other Institutions, notably the Council and European Parliament having a robust Impact Assessment regime in relation to any amendments to Commission proposals that they adopt.¹²⁷ The European Parliament in 2012 established an Impact Assessment Unit.

¹²¹ Ian Cooper, 'A 'Virtual Third Chamber' for the European Union? National Parliaments after the Treaty of Lisbon,' *West European Politics*, (2012), 35:3,441-465; and Ian Cooper 'Bicameral or Tricameral? National Parliaments and Representative Democracy in the European Union', *Journal of European Integration*, (2013), 35:5, 531-546.

¹²² *Record of 7 May 2014 stakeholder event, FCO London.*

¹²³ Wyatt, *submission of evidence.*

¹²⁴ Prof. Robert Schutze, Durham University, *submission of evidence.*

¹²⁵ House of Lords EU Committee – 2009-10 Session Fourth Report *Impact Assessments in the EU: room for improvement?* (2010)

¹²⁶ House of Lords EU Committee – 2009-10 Session Fourth Report *Impact Assessments in the EU: room for improvement?* (2010) paragraph 72. Available at: www.publications.parliament.uk/pa/ld200910/ldselect/ldcom/61/6102.htm, accessed on 27 November 2014.

¹²⁷ *Record of 29 April 2014 stakeholder event Brussels.*

Evidence on Institutional Issues Related to Subsidiarity and Proportionality from other Balance of Competences Reports

Review of the Balance of Competences between the United Kingdom and the European Union: Agriculture

- The National Farmers Union (NFU) argued that introduction of ‘delegated’ acts which conferred greater powers of implementation on the Commission was a further backwards step in the EU governance landscape. [Paragraph 2.121]
- The Food and Drink Federation said that the trilogue mechanism for resolving differences between the institutions introduced a lack of transparency. This could result in provisions being agreed without the benefit of adequate consultation and Impact Assessment. [Paragraph 2.119]

Review of the Balance of Competences between the United Kingdom and the European Union: Competition and Consumer Policy

- There was also concern that the Delegated and Implementing Acts provided by the Lisbon Treaty had removed oversight by the European Parliament and Council. Although these Acts allow the Commission to make only small technical amendments without going through a legislative procedure, the Advertising Association voiced the concern that use of such Acts could be open to abuse and allow the Commission to give itself significant powers while taking them away from national authorities. For example, the Commission’s proposal on Data Protection Regulations included 26 provisions that granted the Commission the power to adopt Delegated Acts, with a further 19 provisions that allowed the Commission to adopt Implementing Acts. Upon scrutiny by the Council and European Parliament, the vast majority of these references were removed. [Paragraph 3.123]

Review of the Balance of Competences between the United Kingdom and the European Union: Energy

- It was felt that time-scales for the consultation, negotiation, adoption and/or implementation of EU legislation could be improved and generally lengthened in order to help deliver higher quality legislation. An example cited was the Health and Safety Offshore Directive, negotiated the previous year. According to stakeholders in the Aberdeen workshop, much time had been spent during the negotiations on the original proposal (in the form of a regulation) to educate both MEPs and the Commission on practical operational aspects of work offshore (as opposed to onshore). A more flexible directive was subsequently agreed and thereby avoided the large cost implications of the original proposals. [Paragraph 2.1.47]
- In particular, stakeholders from all sectors highlighted issues around the development and use of impact assessments for new legislation, the inflexibility of EU processes to adapt to changing circumstances and the tendency for the Commission to pursue new legislation rather than focussing on monitoring, enforcement and revision of existing legislation. [Executive summary, p7]

- RSPB suggested that: 'many of the Impact Assessment process weaknesses in practice are a result of Directorates General (DGs) carrying them out "in-house", whilst AB Sugar wrote: 'We feel that the Commission does not provide adequate data and analysis in its impact assessments and we would like to see this situation improved. We could then more effectively engage in the democratic process'. The weakness of the consultation process was also mentioned as an issue in the nuclear and other workshops. [Paragraph 2.1.49]
- EDF were also concerned that the: 'economic assessment of costs and benefits in legislation impact assessments is not always comprehensive or robust'. They raised a concern about outsourcing to consultants given they were not always able to gain the necessary insight into sector circumstances. [Para 2.1. 50]
- In addition stakeholders felt that impact assessments:
 - did not consider or skated over the need for 'coherence' of one policy or target over another, particularly those where Directorates (other than DG Energy), were involved and their policies impacted heavily on the energy sector. This applied particularly in the cross over with environmental, state aid and health and safety considerations. This was a recurrent comment by stakeholders;
 - should be carried out at intervals, particularly where there is a sunset provision in legislation, to help ensure legislation is/remains 'fit for purpose'; and
 - should be redone where the legislative process has led to significant changes in the original proposals – cost implications of last minute changes should be evaluated. Again cost was a recurrent issue.
- Participants in the nuclear stakeholder workshop were highly critical of the quality of Commission consultations. They felt most recent consultations on nuclear safety and nuclear liability had been very poor due mainly to the very low visibility of consultations. As a result the Commission received a very small number of responses for their proposals. This was a problem if the Commission then takes forward actions on nuclear safety based on a very small sample (300 was quoted in one case). Stakeholders also felt that the questions that were asked by the Commission were inappropriate – they tended to be leading questions. [Para 2.6.19]

Review of the Balance of Competences between the United Kingdom and the European Union: Financial Services

- Almost all industry respondents have detailed and targeted criticisms to make, covering:
 - The quality of the Commission's impact assessments, consultations, and policy-making and policy proposals;
 - The transparency, evaluation and quality of changes made to Commission proposals by the Council and Parliament and the way in which common texts are then agreed in trilogue discussions; and
 - The quality of subordinate legislation. [Para 4.6]

- It was suggested that consideration could be given to the Council and Parliament agreeing that substantive new provisions would require consultation and impact assessment. Indeed, the inter-institutional agreement on better law-making envisages that there will be an impact assessment before ‘the adoption of any substantive amendment’ at first reading or conciliation. Complying with this agreement and extending it to all stages of the legislative process would help address the risk of new proposals emerging at the trilogue stage or later, a practice that undermines all better regulation standards. Greater willingness to go to second readings might also help in this area. It could be worth considering whether a failure to comply with these standards should be made reviewable by the courts with the remedy being the striking down of provisions that were deemed non-compliant. [Para 4.64]

Review of the Balance of Competences between the United Kingdom and the European Union: Fisheries

- Several respondents commented on the process of policy making by the EU and how this could be improved. The South Western Fish Producers Organisation (SWFPO) felt that the decision making process was too hurried resulting in greater ECJ intervention to clarify the law. [Paragraph 2.105]
- Article 43(2) provides for the use of the ordinary legislative procedure to establish provision to pursue Common Fisheries Policy objectives but Art 43(3) provides for the Council alone to decide on certain measures including fixing and allocation of fishing opportunities[...] There is debate between Member State and the EU institutions as to which targets can be adopted via ordinary legislative procedure. This has resulted in a legal impasse between the Council on the one hand and the European Parliament and Commission on the other. This has been referred to the ECJ. [Box p52]
- The Food and Drink Federation had concerns over lack of transparency in the final stages of the renegotiation process between the European Parliament, Council and Commission which it felt led to provisions being adopted that had not been subject to scrutiny at earlier stages. [Paragraph 2.110]

Review of the Balance of Competences between the United Kingdom and the European Union: Fundamental Rights

- There was mixed evidence on the case law of the ECJ; while some considered that it has simply upheld fundamental rights, others considered that some of its judgements have undermined national sovereignty and the democratic competence of the EU’s legislative institutions. [Executive summary, p4]
- The ECJ’s approach to balancing competing interests has undermined national sovereignty and the democratic competence of the EU’s legislative institutions. [Paragraph 4.86]
- Policy Exchange: “There is no effective check on whether the ECJ acts within its competence”. [Paragraph 4.15]
- The ECJ has generally followed the case law of the European Court of Human Rights (ECtHR). The effect is that European Court of Human Rights case law, which UK courts only have to take into account under the Human Rights Act, can become binding in domestic law through its incorporation by the ECJ. Policy Exchange considered “the binding nature of ECJ case law means that its impact on parliamentary sovereignty is even more severe than the jurisprudence of the ECtHR”. [Paragraph 4.35]

Review of the Balance of Competences between the United Kingdom and the European Union: Social and Employment

- The Commission vs Germany case: The ECJ made a judgement that severely restricted what was the perceived flexibility of the Member States to determine the circumstances when a written health and safety risk assessment is required. This was on the basis of a case brought by the Commission against Germany over the latter's national legislation exempting employers of fewer than eleven persons from keeping documents containing risk assessment results. [Paragraph 3.41]
- Respondents argued strongly in favour of the need to improve impact assessments at EU level to improve the quality and legitimacy of the legislative framework – including giving greater consideration to the Commission's impact assessment board before the adoption of a Commission proposal and making regular use of independent expert knowledge. The FSB said they would like to see an independent body which could champion smart regulation and scrutinise the costs and benefits of proposals across all EU institutions. The Institute of Directors (IoD) and CBI highlighted and attendees at a stakeholder event argued for the importance of increasing transparency and for Impact Assessments (IAs) to be published at different stages of the legislative process. [Paragraphs 3.36-7]

E. Flexibility Clause

- 2.92 Some evidence was received on the flexibility clause, but less than that on subsidiarity.
- 2.93 As De Baere points out, there is an inherent tension between the desire for greater clarity on where competence lies on the one hand and the potential need for flexibility.¹²⁸ However evidence received shows that commentators generally consider both that such a provision is necessary for the EU, and that it is appropriate to have stringent safeguards on its use.

Necessity and Desirability of a Catch-all Clause

- 2.94 It was pointed out that such a general purpose clause is not uncommon in the governing documents of institutions in order to allow for developments that are in the organisation's interests but are not strictly covered by some other provision.¹²⁹ The Senior European Experts Group considered that the value of Article 352 was demonstrated by the early European Communities legislation on the environment where at that time there was a clear need to tackle cross-border pollution in Europe but no specific Treaty provision on the environment (this only came in the 1986 Single European Act).¹³⁰
- 2.95 A participant in the legal seminar highlighted the impossibility of anticipating every potential policy or technological development; for example, being able to give the full force of law to the electronic version of the Official Journal (thus avoiding the need to print paper copies) seems sensible.¹³¹ It was also pointed out that such an article would continue to be needed in order to amend or update legislation previously adopted under this article.¹³² The Law Societies consider this catch-all treaty basis logical if all Member States agree that a certain action should be undertaken, allowing it to be carried

¹²⁸ De Baere, *submission of evidence*.

¹²⁹ Senior European Experts Group, *submission of evidence*.

¹³⁰ Senior European Experts Group, *submission of evidence*.

¹³¹ *Record of 7 May 2014 stakeholder event*.

¹³² *Idem*.

out using EU structures already in place, and therefore brought within the EU legal framework, facilitating coherence and consistency.

- 2.96 Brussels and Europe Liberal Democrats noted that, ‘there are conceivable scenarios in the future [...] where the UK and like-minded nations may wish to push for action or legislation in certain areas where the treaties have not specifically mandated this to happen [...]. [S]uch an option should be seen as a possible avenue for reform’.¹³³ They suggest that this could provide the means for the EU legislature to respond to ECJ rulings which ‘take EU law has beyond what the legislators and national parliaments agreed to’.¹³⁴
- 2.97 The UK Government’s view is that the EU should only be able to make decisions if there is a specific legal basis for doing so in the Treaties. This clause should therefore not be used with any regularity to fill any gaps where no specific provisions of the Treaty confer express or implied powers to act.
- 2.98 The UK Government is therefore keen to ensure that the flexibility clause is protected from misuse as it is an extremely wide and flexible legal basis that has the potential to extend to anything coming within the Union’s competence (as defined by its tasks and activities in Articles 3 TEU and 3, 4 and 6 TFEU). That is why the UK Government enacted Section 8 of the European Union Act 2011 which provides that a Minister of the Crown may not vote in favour of, or otherwise support, a proposal for EU legislation which is based on Article 352 TFEU, in whole or in part, unless the draft legislation has received prior approval by Act of Parliament (subject to a few exceptions).

The Need for Safeguards

- 2.99 Several of those providing evidence expressed concerns about the potential for this article to be used to effect treaty change or competence creep by the back door. For example the Law Societies said that, ‘the provision should be used sparingly, not least so that EU law develops in accordance with the expectations of its citizens. If it were used too frequently, or to extend competence in a particular sphere, this might more appropriately be dealt with by treaty reform in order to provide the requisite legal basis on a more formal footing’.¹³⁵
- 2.100 Respondents noted a number of safeguards that are now in place, as a result of Treaty amendments, court rulings and Member State controls:
- The requirement for Member State unanimity, which safeguards Member State powers;¹³⁶
 - The Commission must draw the attention of national parliaments to proposals using this legal base;
 - Some Member States have additional parliamentary requirements, such as Section 8 of the UK EU Act 2011, which requires the UK Parliament to approve the use of Article 352;

¹³³ Brussels and Europe Liberal Democrats, *submission of evidence*.

¹³⁴ *Idem*.

¹³⁵ Law Society and Law Society of Scotland, *submission of evidence*.

¹³⁶ *Idem*.

- The European Parliament has the right to block such actions (but not to amend or propose them);¹³⁷
- The ECJ's self-restraint in Opinions 1/94 and 2/94 which mean that the competence under Article 352 TFEU 'does not create an obligation, but confers on the Council an option, failure to exercise which cannot affect the validity of proceedings';¹³⁸ and
- The powerful warnings issued by national courts and parliaments against an unprecedented use of EU residual competence.¹³⁹

The Role of National Governments and Parliaments

2.101 Dr Theodore Konstadinides emphasised the need for the UK Government (and presumably, all national governments and parliaments) to scrutinise proposals early and proactively, to avoid setting precedents or competence creep, notwithstanding the legal safeguards available in the form of the requirement for unanimity and an Act of Parliament.¹⁴⁰

2.102 It was also suggested that national constitutional orders of Member States should be considered, both national mechanisms designed to enhance parliamentary oversight of the use of Article 352 TFEU, such as Section 8 of the UK European Union Act 2011, as described at 1.94 above, and relevant constitutional court rulings.

Case Study: Monti II Regulation and Article 352

Article 352 was used as a legal basis in the proposal for the Monti II Regulation referred to in the text box on 'Yellow Cards' in Practice at page 30. A number of Member States objected to the use of Article 352 TFEU as the legal basis and argued that the Commission was deliberately using Article 352 TFEU to circumvent the limits in an alternative article. For example, the UK House of Commons took the view that necessity for EU action has to be 'substantiated by evidence collated and assessed in an impact assessment, rather than by a perception of a need to act'. The House of Commons considered that the Commission's explanatory memorandum and impact assessment were 'largely based on perceptions of a need to act, which are necessarily subjective, in contrast to objective evidence of a need to act'.

2.103 Garcia comments that, 'Given the element of uncertainty in policy-making, it is necessary to have such an Article providing a legal base for action, in order to allow the desired policy outputs. Unanimity in the Council and approval by the EP are sensible measures to ensure the Article is not abused. At the voting stage, the Council and EP could possibly also agree on a specific mandate setting out the room for manoeuvre for the Commission in the particular instance, so as to further control the Commission and assuage concerns about potential Commission over-reach'.¹⁴¹

¹³⁷ Brussels and Europe Liberal Democrats, *submission of evidence*.

¹³⁸ De Baere, *submission of evidence*.

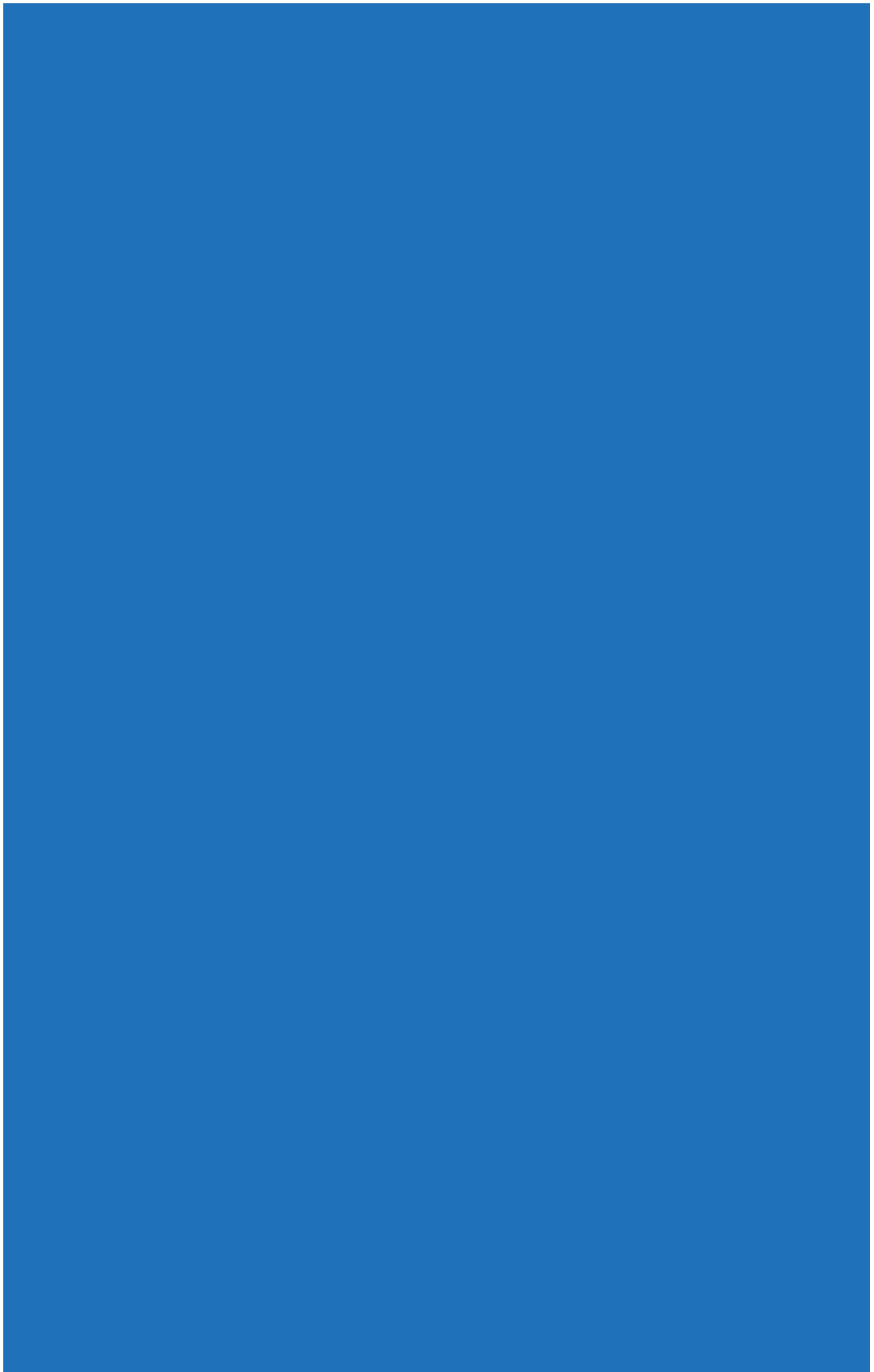
¹³⁹ Konstantinides, *submission of evidence*.

¹⁴⁰ *Idem*.

¹⁴¹ Garcia, *submission of evidence*.

- 2.104 This sums up the balance of views received on Article 352: a catch-all clause has a useful function but there need to be appropriate safeguards to ensure that it does not upset the balance of powers within the EU framework. Whilst some commentators noted extensive use of the predecessor article, there was less concern expressed about the current article.
- 2.105 Since many of the matters dealt with under the predecessor Articles to Article 352 are now dealt with under new Treaty articles added by the Lisbon Treaty, there has been a sharp reduction in the number of Article 352 proposals. So commentators consider that the heyday of the article has probably passed but that it will retain a residual role.¹⁴²

¹⁴² Konstantinides, *submission of evidence*.



Chapter 3: Future Options and Challenges

- 3.1 Many contributors to this, and many other Balance of Competences reports, offered suggestions on how to improve implementation of subsidiarity and proportionality in the EU. These suggestions range from practical steps to strengthen implementation of existing rules through to more fundamental rebalancing of the relations and competences amongst the different EU actors, including Member States and national parliaments. As well as the evidence received, ideas in academic and think-tank publications have also been included.
- 3.2 This chapter is structured in the following way, with parts A-D mirroring the issues identified in parts B-E of Chapter Two, and part E broadening out to the wider debate about how to ensure a greater sense of connection between EU activity and the public, greater legitimacy for the EU and more involvement of national parliaments, of which arguably subsidiarity and proportionality are one aspect.
- Part A: Proposals or recommendations to improve current mechanisms to ensure respect for subsidiarity;
 - Part B: Proposals or recommendations to improve current mechanisms to ensure respect for proportionality;
 - Part C: Proposals or recommendations for institutional improvements;
 - Part D: Proposals relating to Article 352
 - Part E: Broader proposals or future challenges relating to the democratic legitimacy of the EU.
- 3.3 The UK Government view is that the mechanisms to protect subsidiarity and proportionality could be improved in a number of ways. In its reply to the House of Lords report on the Role of National Parliaments in the EU, it said: ‘The Government agrees that many substantial improvements to the role of national parliaments in the EU can be achieved through political agreement now, and cemented in the Treaties in due course. [...]The Commission could, and should, make a political agreement to such improvements now. [...] The Government welcomes the emphasis in the conclusions of the June European Council on the value of closer involvement by national parliaments in the EU’s functioning’.¹

¹ Government Response to the House of Lords European Union Committee, Report HL 151 of Session 2013-14 *The Role of National Parliaments in the European Union* (July 2014).

A. Proposals to Improve Respect for Subsidiarity

- 3.4 Considering the subsidiarity principle to be ambiguous or subjective, some contributors recommended further work to define the principle, or to agree criteria or a checklist to apply it. Some considered that a common interpretation would help more co-ordinated engagement of national parliaments, and thereby enhance the democratic legitimacy of the EU.² They suggested that clearer guidance might facilitate both judicial and political review, and help the drafters and adopters of legislation to produce better regulation. Both the European Commission and European Parliament have proposed guidelines or checklists as ways to guide the adherence to and assessment of compliance with the principles. But one commentator questioned whether it would be possible to discern a single, clear intention behind the principles of subsidiarity and proportionality as found in the Treaties, doubting that there was agreement among Member States on the idea that subsidiarity was intended to slow down further integration or transfers of sovereignty from Member States to the EU. De Baere also noted that individual Member State views fluctuate along with the make-up of their governments, and depending on whether they agree with the proposal in question.³
- 3.5 Dougan and Horsley comment that: '[A]s they currently stand, the Treaties provide no clear steer towards any one conception of subsidiarity over any other. It may well be that future Treaty reform will recognise the existing tensions and lay down a clearer vision for the various legislative and judicial actors to subscribe to and pursue. The key task will surely be to design a system that gives a more effective voice to the national parliaments without unduly distorting the Union's own institutional balance'.⁴
- 3.6 A number of pieces of evidence recalled the different models for legislation, suggesting that they could be used more often and thus address subsidiarity concerns. In this regard, some detailed proposals included the suggestions that that:
- Where appropriate, delivering regulation and enforcement at different levels (and enforcement need not always be by a state body). The Law Societies gave the example of competition law where the rules are set out at EU level and are policed by competition authorities at national level working in cooperation with one another;⁵
 - Optional legal instruments, for voluntary 'opt-in'. This free market approach to regulation could potentially increase regulatory competition and drive innovation, similar to the US state level 'laboratory model' whereby states can experiment with solutions to legal problems, and gradually the most effective model becomes the norm;⁶
 - Greater use of frameworks at EU level setting out the minimum standards, leaving details to Member States;⁷
 - Mutual recognition of national standards;⁸ and
 - Full exploration of non-legislative alternatives.⁹

² CEPS High-level Group, *Shifting EU Institutional Reform into High Gear* (2014).

³ De Baere, *submission of evidence*.

⁴ Dougan and Horsley, *submission of evidence*.

⁵ Law Society and Law Society of Scotland, *submission of evidence*.

⁶ *Idem*. In addition Wyatt, *submission of evidence*.

⁷ De Baere, *submission of evidence*; Schutze, *submission of evidence*.

⁸ Kamall, *submission of evidence*.

⁹ *Record of 29 April 2014 stakeholder event, Brussels*, Local Government Association, *submission of evidence*.

- 3.7 Evidence from across the Balance of Competences review shows that these choices will not always be straightforward. There is a tension around how far the Single Market and ‘level playing field’ arguments justify harmonisation of laws as compared to some of these more flexible approaches suggested above, which can better accommodate differing local circumstances. Proper consideration of the full range of options for EU rules and legislation is however an important factor in affording differing levels of flexibility.
- 3.8 The CBI called for a moratorium ‘on any new regulation where adequate national legislation already exists until the principle of subsidiarity is fully restored’.¹⁰

B. Proposals on Proportionality

- 3.9 Business for New Europe proposed a simple test for proportionality, parallel to that proposed by the Dutch Government for subsidiarity (‘Europe where necessary; national where possible’) : ‘Legislation where it is needed for the effective functioning of the Union, particularly the Single Market: other approaches where not’.¹¹
- 3.10 The main proposals for proportionality are considered in Part C below, as they relate to strengthening the role of national parliaments, and improving the assessment of the impact of EU legislation.

C. Proposals on Institutional Issues

- 3.11 Evidence in Chapter Two pointed to some of the institutional and cultural challenges around subsidiarity and proportionality. The shape of the new Commission and mandate of the new College of Commissioners may address some of these issues. For example, the mission letter to Frans Timmermans, First Vice-President designate of the European Commission, requests that he specifically focus on ‘coordinating the work on better regulation within the Commission, ensuring the compliance of EU proposals with the principles of subsidiarity and proportionality, and working with the European Parliament and the Council to remove unnecessary ‘red tape’ at both European and national level. This includes steering the Commission’s work on the ‘Regulatory Fitness and Performance Programme’ (REFIT) of EU legislation and ensuring the quality of impact assessments underpinning our activities’.¹² Evidence was also received suggesting institutional changes which could improve respect for proportionality and subsidiarity. These fall into two main categories, the first relating to the role of national parliaments, and the second around impact assessments.

(i) Strengthening the Role of National Parliaments

- 3.12 As described at 1.37 above, the Lisbon Treaty introduced the possibility for national parliaments to issue ‘reasoned opinions’ to object to proposals on grounds of subsidiarity, and where sufficient opinions are issued, this is known as a ‘yellow card’. The strict time limits (eight weeks), voting thresholds, and limitations on scope were each questioned in evidence.

¹⁰ CBI, *Our Global Future* (2013).

¹¹ Business for New Europe, *submission of evidence*.

¹² European Commission, *Biography of First Vice President, Frans Timmermans* (2014).

Increase Time and Other Practical Measures

- 3.13 Numerous pieces of evidence called for an increase in the time allowed for national parliaments to comment on draft legislation under the early warning mechanism from 8 to 12 weeks or longer.¹³ It was suggested that this would give them more time for discussion, to prepare high quality opinions, for coalition-building domestically, to involve sub-national and regional actors, as well as civil society, non-departmental public bodies and business (thus potentially increasing input legitimacy and contributing to better quality of legislation), to consult other actors across Europe, to co-ordinate with other national parliaments and to manage periods of parliamentary recess, without unduly slowing the speed of the EU legislative process.¹⁴ (It was noted that there was no deadline for the Commission's responses which could take 7-8 months). It was considered that this would not necessarily require changes to the Treaties (although the time periods are specified in the Treaties) as the Commission could make a political commitment to consider reasoned opinions received within a certain period.¹⁵ The UK Government also believes that an extension of the deadline could be achieved through a political commitment on the part of the Commission.
- 3.14 The UK Government agrees that new mechanisms should be considered, and endorses a proposal led by the Danish *Folketing*, signed by 29 (of 41) national parliamentary chambers in EU Member States, calling for a Commission working group to be established to consider the issue in greater detail and make recommendations.¹⁶
- 3.15 The European Parliament in its most recent resolution on subsidiarity and proportionality continued to request a more detailed examination of the problems national parliaments encounter in order to improve the functioning of the existing mechanisms, including the number of national parliament responses required to trigger such a procedure, whether it should be limited to subsidiarity, and what its effect should be. It also suggested a number of practical measures to increase the visibility of reasoned opinions, including publishing in the Official Journal where national parliaments have raised concerns, and forwarding reasoned opinions to the co-legislators without delay.¹⁷

'Red Cards'

- 3.16 One reform proposal is to introduce a so-called 'red card' to allow a certain number of national parliaments to block outright new Commission proposals or retroactively annul existing legislation.¹⁸ The Centre for European Reform (CER) proposed a 'red card' under which the Commission would withdraw a legislative proposal if half of all national parliamentary chambers voted against it on subsidiarity grounds. CER suggest

¹³ Hunt and Wyatt proposed of up to 16 weeks. See Senior European Experts Group, *submission of evidence* and Wyatt, *submission of evidence*.

¹⁴ See Kamer Tweede, *Democratic Legitimacy in the EU and the role of national parliaments: A position paper of the Dutch House of Representatives* (YYYY). Available at: www.tweedekamer.nl/images/Position_paper_Dutch_House_of_Representatives_on_democratic_legitimacy_in_the_EU_final_181-236782.pdf accessed on DD Month YYYY; Electoral Reform Society, *submission of evidence*; Garcia, *submission of evidence*; *Record of 27 June 2014 stakeholder engagement, Emerging Themes*; British Telecom, *submission of evidence*.

¹⁵ For example, Senior European Experts Group, *submission of evidence*.

¹⁶ The June 2014 letter from national parliaments to President-elect of the European Commission, Jean-Claude Juncker, follows on from a COSAC meeting.

¹⁷ European Parliament, *EU regulatory fitness and subsidiarity and proportionality – better lawmaking* (2014)

¹⁸ Some commentators and the UK's House of Lords EU Committee refer to the ability of national parliaments to refer cases to the ECJ, via their government, as being a red card (described at 1.1.41 above). This report does not use that terminology. See Hugo Brady, *The EU's yellow card comes of age: subsidiarity unbound?* –, (12 November 2013). Available at: www.cer.org.uk/insights/eus-yellow-card-comes-age-subsidiarity-unbound, accessed on 27 November 2014.

that the advantage of a ‘red card’ system would be to enhance the powers of national parliaments, thus increasing accountability.¹⁹ This was also supported by Fresh Start, with a view to changing the relationship between national parliaments and the Commission, particularly in light of the Commission’s continuation of the European Public Prosecutor’s Office (EPPO) proposal.²⁰ In its reply to the Lords inquiry on national parliaments in the EU, the UK Government said that a sufficient threshold of national parliaments should have the power to block a proposal if they found that it violated subsidiarity. It considered that this would assure national parliaments that their position would have an effect.

- 3.17 Some noted that the threshold for a ‘red card’ would have to be relatively high, and others wondered if it were necessary, given that the ‘orange card’ threshold had not yet been met.²¹ Some commentators expressed concerns about adding additional layers on to an already complex system, and considered that simplification would be preferable.²² Others had concerns about the democratic implications, what the impact would be on the separation of powers within Member States and the EU, and highlighted the risk of frustrating EU decision-making without increasing its effectiveness.²³

Treat ‘Yellow Cards’ as ‘Red’

- 3.18 An alternative or additional approach that some advocated was for ‘yellow cards’ to be treated in effect as ‘red cards’, with the Commission undertaking to reconsider its proposal. Among those advocating this was former Netherlands Foreign Minister, Frans Timmermans, now First Vice-President in the European Commission.²⁴ The House of Lords EU Committee in its 2013-14 report on the Role of National Parliaments in the European Union supported this position, considering that ‘the Commission should make an undertaking that, when a ‘yellow card’ is issued, it will either drop the proposal in question, or substantially amend it in order to meet the concerns expressed’.²⁵ The Committee’s conclusion is partly based on the Commission’s response to the EPPO ‘yellow card’, where the Commission decided to maintain the proposal unchanged disagreeing with national parliaments that it raised subsidiarity concerns. It suggested the aim would be to focus the procedure away from whether the concerns were consistent with the Commission’s own interpretation of subsidiarity to what should be altered to address the concerns expressed by a large number of national chambers.²⁶ It also recognised that the reasoned opinion procedure currently places the Commission in a difficult position, as a ‘yellow card’ invites it to review a proposal which it will already have decided is consistent, from the Commission point of view, with the principle of subsidiarity.

¹⁹ CER, *Can National Parliaments Make the EU More Legitimate?* Available at www.cer.org.uk/insights/can-national-parliaments-make-eu-more-legitimate (2013), accessed on 27 November 2014; and Charles Grant, *See How to Build a Modern European Union* (October 2013). Available at: www.cer.org.uk/sites/default/files/publications/attachments/pdf/2013/rp_119-7927.pdf, accessed on 27 November 2014.

²⁰ Fresh Start, *Mandate for Reform* (November 2013) available at: www.eufreshstart.org/downloads/mandateforreform.pdf accessed on 27 November 2014.

²¹ *Record of 29 April 2014 stakeholder event, Brussels.*

²² *Record of 25 June 2014 stakeholder event, Copenhagen*; Prof. Robert Schutze, *submission of evidence.*

²³ *Record of 25 June 2014 stakeholder event, Copenhagen* and Dr. Ozlem Ulgen, *submission of evidence.* This proposal was considered at the Convention on the Future of Europe, which recommended effective early participation of national parliaments in scrutinising legislation

²⁴ The Financial Times, *Monnet’s Europe needs reform to fit the 21st century* (14 November 2013).

²⁵ House of Lords European Union Committee, *The Role of National Parliament in the European Union*, 9th Report of the Session 2013-14 (2014). Available at: www.publications.parliament.uk/pa/ld201314/ldselect/lducom/151/151.pdf, accessed on 27 November 2014.

²⁶ *Idem.*

- 3.19 The UK Government position was set out Minister for Europe, David Lidington, who said in evidence to the Lords inquiry that, '[t]he Government would like to see greater use made of this mechanism, and for the Commission to respond more systematically and effectively to opinions, including to make a political commitment that it will respond to opinions or requests issued by more than a third of chambers – a development which COSAC itself has called for'.²⁷ The Government's written response to the inquiry recommendations further supported this recommendation.²⁸
- 3.20 Others such as Dr Ozlem Ulgen considered that such a commitment would undermine the Commission's right of initiative, encourage protest votes by national parliaments and hinder productive dialogue between the Commission and national parliaments, and would amount to treaty change by the back door.²⁹ The Law Societies suggest that at least the Commission should not be allowed to proceed with the same proposal without providing additional evidence to make the case that subsidiarity has been met.³⁰

'Late Cards' and Review of Existing Legislation

- 3.21 The lower house of the Netherlands Parliament noted a proposal that national parliaments be allowed to exercise their prerogatives after co-decision is complete through a so-called 'late card'.³¹ The House of Lords EU Committee agreed that there was a need to consider further whether and how to allow engagement of national parliaments throughout the legislative process, given that proposals often evolve over the course of years. The EU Committee also noted that it would be challenging to create a mechanism which worked effectively from the point of view of national parliaments, and which did not make the already complex EU legislative process more unwieldy. It recommended further consideration of the suggestion that the reasoned opinion procedure might remain open, or be re-engaged at some later point.³² The issue of legislation changing quite significantly through negotiations is also relevant to impact assessments, considered further below.
- 3.22 There are also calls for national parliaments to have the right to require reconsideration or repeal of existing legislation. For example, Fresh Start in a November 2013 report called for the red card to apply to existing rules, in order to provide a mechanism for national parliaments to tackle existing legislation, suggesting it should trigger a one year sunset clause after which the legislation would expire unless particular member states decide to retain it. *Fresh Start* considered that this would be a 'game changer' and a 'permanent means to reverse the ongoing EU power-grab'.³³ The Dutch Parliament has

²⁷ Irish Presidency of the Council of the European Union, *Contribution of the XLIX COSAC*, (2013). Available at: www.parleu2013.ie/wp-content/uploads/2012/12/Contribution-EN.pdf, accessed on 27 November 2014.

²⁸ Government Response to the House of Lords European Union Committee Report HL 151 of Session 2013-14 *The Role of National Parliaments in the European Union* (Cm 8913)(July 2014). Available at: www.parliament.uk/documents/lords-committees/eu-select/Role%20of%20national%20parliaments/govt-response-EUC-national-parliaments-report.pdf, accessed on 27 November 2014.

²⁹ Ulgen, *submission of evidence*.

³⁰ Law Society and Law Society of Scotland, *submission of evidence*.

³¹ Tweede Kamer report, available at: www.tweedekamer.nl/images/Position_paper_Dutch_House_of_Representatives_on_democratic_legitimacy_in_the_EU_final_181-236782.pdf

³² House of Lords European Union Committee Report HL 151 of Session 2013-14 *The Role of National Parliaments in the European Union* (Cm 8913) (2014) p98.

³³ Fresh Start, *Mandate for Reform*, (November 2013). Available at: www.eufreshstart.org/downloads/mandateforreform.pdf, accessed on 27 November 2014.

also proposed a similar mechanism. The UK Government has expressed its willingness to explore whether red cards might be exercised in relation to existing legislation.³⁴

- 3.23 The need for review of existing legislation has been recognised by the European Commission in its impact assessment guidelines (set out in Chapter One above) and REFIT plan (see Chapter Two). Hunt comments: '[T]he assessment of whether particular actions respect the principle of subsidiarity may evolve over time, with the decision that previously established actions should be scaled back or discontinued, or new actions introduced. Subsidiarity assessment is thus quite dynamic and not a mechanical process whereby one 'right' answer is necessarily able to be read off'.³⁵ These arguments in favour of reassessing of the rulebook for compliance with subsidiarity are also relevant to proportionality and more broadly.

Green Cards and Engagement between National Parliaments and the EU

- 3.24 The Lithuanian Parliament (*Seimas*) paper for the Conference of EU National Parliaments' Speakers notes that the current system gives national parliaments the power only to block or force a reconsideration of legislation, rather than empowering national parliaments to shape positively EU legislation through more constructive engagement. The former President of the European Commission, José Manuel Barroso, initiated a political dialogue with national parliaments in 2006 which provides national parliaments with the opportunity to submit opinions or contributions on proposals and consultation documents without a time limit, the Commission guaranteeing a reply. Parliaments, including through COSAC, continue to request timelier and better quality replies to these contributions, as well as to reasoned opinions.³⁶ National parliaments stated that more information on how reasoned opinions and yellow cards are dealt with by the Commission would enable them to ensure a better return on their investment of time, and would also increase the transparency of the legislative process to citizens.³⁷ The UK Government supports these calls. In its reply to the XLVII COSAC Contribution, the Commission committed itself to develop a biannual political dialogue with national parliaments within the framework of the European Semester (economic governance). It was noted that both this political dialogue and the early warning mechanism had increased the interest and awareness of EU business in national parliaments.³⁸
- 3.25 Some participants at a Brussels seminar to discuss the issues in this report, and at the above-referenced conference for speakers of EU national parliaments, encouraged Commissioners and European Parliament rapporteurs to give evidence to national parliaments including on subsidiarity issues, positing that Commissioners would respond better to the scrutiny of other politicians, and for the European Parliament and national parliaments to see one another as collaborators rather than competitors.³⁹

³⁴ Government response to the House of Lords European Union Committee Report HL 151 of Session 2013-14 *The Role of National Parliaments in the European Union* (Cm 8913)(July 2014). Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/335241/140721_Government_response_to_EUC_national_parliaments_report.pdf, accessed on 27 November 2014.

³⁵ Hunt, *submission of evidence*.

³⁶ European Commission, publishes an annual report on relations with national parliaments. These are available at: ec.europa.eu/dgs/secretariat_general/relations/relations_other/np/index_en.htm, accessed on 27 November 2014.

³⁷ *Record of Vilnius EU Speakers' Conference*, (July 2014); Official Record of Vilnius EU Speakers' Conference, (July 2014).

³⁸ Thomas Christiansen, Anna-Lena Högenauer & Christine Neuhold, *National Parliaments in the post-Lisbon European Union: Bureaucratization rather than Democratization?* (2012).

³⁹ *Record of 29 April 2014 stakeholder event, Brussels*.

- 3.26 One specific proposal raised by the Dutch *Tweede Kamer* and the Danish *Folketinget* is to develop a ‘green card’ mechanism, to allow national parliaments to propose new policies or legislation to the Commission, including amending or repealing existing EU laws.⁴⁰ The House of Lords EU committee agreed that in principle there should be a way for a group of likeminded national parliaments to make constructive suggestions for EU policy initiatives, which may include reviewing existing legislation.⁴¹ It suggested that this would echo the role which the European Parliament already played through its own initiative reports under Article 225 TFEU. And, in order not to intrude on the Commission’s formal right of initiative, the Committee suggested that it could work through a Commission undertaking to consider such suggestions carefully, and either act on them or explain why not. This sort of reform echoed others’ suggestions of a more constructive role for national parliaments, and a greater dialogue between national parliaments and EU actors.⁴² COSAC’s June 2013 Contributions requested the Commission make a political commitment to respond to opinions or requests issued by more than a third of Chambers.⁴³
- 3.27 The Electoral Reform Society considers that it is reasonable to allow national parliaments to propose legislation when many others have the same ability: ‘At a stage when the Commission, Council, Parliament (de facto) and citizens (through the European Citizen Initiative) have the capability to propose EU legislation, this seems a fair addition’.
- 3.28 The UK Government supports national parliaments’ desire to increase the constructive role that they play in shaping EU policy, including through a ‘green card’ for national parliaments collectively to make policy or legislative suggestions, and agreed with the Committee that this would not undermine the Commission’s formal right of initiative.

Change Voting Rules

- 3.29 No proposal has yet reached the threshold for a so-called ‘orange card’ which needs more than half of the potential ‘votes’ from national parliaments (see 1.38). The Law Society and Law Society of Scotland considered it unlikely that this power to block would ever be used.⁴⁴
- 3.30 Accordingly, some stakeholders have proposed lowering the threshold for a ‘yellow’ or ‘orange card’, for example the Dutch House of Representatives.⁴⁵ The House of Lords agreed that changes to thresholds merited consideration but wondered if other changes (expanding timeframe, or scope) might achieve the same end.⁴⁶ The Law Society and Law Society of Scotland noted that a legal challenge brought by a single Member State could result in a law being struck down and, while there are reasons to leave laws open

⁴⁰ Clingendael and CEPS *From Subsidiarity to Better EU Governance: A Practical Reform Agenda for the EU* (2014). Available at: www.clingendael.nl/sites/default/files/Clingendael%20CEPS%20From%20Subsidiarity%20to%20Better%20EU%20Governance.pdf, accessed on 27 November 2014.

⁴¹ House of Lords European Union Committee Report HL 151 of Session 2013-14 *The Role of National Parliaments in the European Union* (2014). Available at: www.publications.parliament.uk/pa/ld201314/ldselect/lducom/151/151.pdf, accessed on 27 November 2014.

⁴² *Record of 25 June 2014 stakeholder event.*

⁴³ Contribution of the XLIX COASC Dublin, 23-25 June 2013. Available at: <http://www.cosac.eu/documents/contributions-and-conclusions-of-cosac/>

⁴⁴ Law Society and Law Society of Scotland, *submission of evidence.*

⁴⁵ Tweede Kamer, available at: www.tweedekamer.nl/images/Position_paper_Dutch_House_of_Representatives_on_democratic_legitimacy_in_the_EU_final_181-236782.pdf

⁴⁶ House of Lords European Union Committee Report HL 151 of Session 2013-14 *The Role of National Parliaments in the European Union*. Available at: www.publications.parliament.uk/pa/ld201314/ldselect/lducom/151/151.pdf, accessed on 27 November 2014.

to judicial review in this way, 'it might be more logical/consistent to give more weight, or at least pay more attention, to the objections of either a single Member State or a smaller grouping than is currently required at the earlier stage [...]. If a proposal does not meet the subsidiarity test, then it is much better if this can be established at the earlier stage'.⁴⁷ Fresh Start suggested that if three national parliaments expressed concern about a proposal by submitting reasoned opinions, this should trigger a notification from the Commission to all other national parliaments and a significantly extended period for scrutiny.⁴⁸

- 3.31 Cooper argues that, far from allowing minority rule (if minorities in parliaments were able to coordinate an 'orange card'), the system is structured so that in effect any [national parliament] which does not raise subsidiarity objections to a measure has given its tacit consent. This turns the problem on its head: far from being a system allowing minority rule, the [early warning mechanism] is in effect a system requiring supermajority approval. In numbers of parliaments, legislation must meet with the tacit approval of exactly half of [national parliaments] [...] to avoid triggering an 'orange card', and slightly more than two thirds[...] to avoid triggering a 'yellow card'. He goes on to argue that changes to voting rules would be needed for a 'green card'.⁴⁹ However national parliaments would not necessarily agree that the absence of a reasoned opinion constitutes tacit approval for a proposal if they have not had adequate time to consider the proposal, given the tight deadlines as considered at 3.13 to 3.15 above.

Changes to the Scope of the Early Warning Mechanism

- 3.32 A range of views was expressed on the potential expansion of the scope of the early warning mechanism, by expressly allowing national parliaments the right to comment on proportionality – and other matters such as political desirability, legal base and competence – when issuing reasoned opinions under the early warning mechanism. The inclusion of proportionality had been proposed but was not taken up in the Convention on the Future of Europe. One commentator saw benefits in national parliaments being able to review legislation in areas of exclusive EU competence, at least for compliance with proportionality, including so as to be able to make linkages between areas which are closely related in practice but have different competence structures (he cites the exclusive competence area of the Common Fisheries Policy (CFP) and the shared competence area of conserving marine biological resources).⁵⁰ Subsidiarity applies in its strict sense only to areas of shared competence, whilst proportionality applies to all EU activity, and, some argue, is better assessed near the end of the legislative process when the detail is clearer. Others thought it important to test proportionality at an early stage in the legislative process.⁵¹ Concerns were expressed about the risk of 'protest votes' by national parliaments⁵². And some were worried about the EU's capacity to handle numerous yellow cards or legislation being slowed down.⁵³
- 3.33 Others expressed reluctance to restrict the political judgements of political actors, such as national governments and parliaments. They considered that national parliaments' views were important for democratic legitimacy and accountability and should not be

⁴⁷ Law Society and Law Society of Scotland, *submission of evidence*.

⁴⁸ Fresh Start, *submission of evidence*.

⁴⁹ Ian Cooper, *submission of evidence*.

⁵⁰ Wyatt, *submission of evidence*.

⁵¹ Brussels and Europe Liberal Democrats, *submission of evidence*.

⁵² Ulgen, *submission of evidence*.

⁵³ *Record of 22 May 2014 stakeholder event, Dublin*.

restricted. Wyatt for example, noted that although the ECJ did review EU acts on grounds of proportionality, the scope of judicial review was limited, with this judicial deference an implicit recognition that there is ‘a policy and political dimension to proportionality’ which is therefore not subject to judicial control’, and that ‘National Parliaments would seem to be ideally suited to enforce compliance with proportionality [...] since they have a democratic legitimacy which qualifies them to address the policy and political dimension to proportionality’.⁵⁴ The UK Government would not want to limit national parliaments’ prerogative to make a political judgment on whether proposals respect the principles.

- 3.34 Barber considered it impossible to enforce restrictions on what parliaments chose to comment on, and viewed it as desirable that could comment on areas such as human rights or political desirability, which were important too.⁵⁵ The Dutch Parliament also suggested reasoned opinions should be able to cover proportionality and legal base.⁵⁶ Subsidiarity and proportionality were frequently conflated in impact assessments, and many national parliaments considered subsidiarity checks ineffective without including proportionality.⁵⁷ The fact that previous reasoned opinions and yellow cards had covered other matters such as proportionality and competence showed that national parliaments have incentives to, and the ability to protect those too, and/or that it is impractical to split these off from subsidiarity in political if not legal terms.⁵⁸

The two concepts are clearly closely related, and explicitly extending the procedure to include proportionality would avoid sterile disputes about whether a particular concern about a proposal fell under one heading or the other. It would make it more clear that, as well as examining the objectives of the proposed action, national parliaments should be examining the precise content and form of that action.⁵⁹

(ii) Impact Assessments and Review of Existing Legislation

- 3.35 There were numerous suggestions in evidence to this report, as well as many other Balance of Competences reports, on how European Commission impact assessments of draft legislation could be improved, which commentators suggested could improve respect for subsidiarity and proportionality, by more rigorous assessment and consultation at an earlier stage in the legislative process. The Senior European Experts suggested that the credibility of the impact assessment process ‘would be considerably enhanced’ if the Impact Assessment Board had more weight (for example, if its membership included some external members) and was more transparent (if there was clear evidence that some proposals were rejected or substantially amended because they had failed the subsidiarity test). This would respond to the criticism that the Commission (or other institution proposing the legislation) is both judge and jury on subsidiarity.⁶⁰ Other suggestions included to:

⁵⁴ Wyatt, *submission of evidence*.

⁵⁵ Barber, *submission of evidence*.

⁵⁶ Tweede Kamer, available at: www.tweedekamer.nl/images/Position_paper_Dutch_House_of_Representatives_on_democratic_legitimacy_in_the_EU_final_181-236782.pdf

⁵⁷ See also De Baere, *submission of evidence*.

⁵⁸ Senior European Experts Group, *submission of evidence*.

⁵⁹ House of Lords European Union Committee Report HL 151 of Session 2013-14 The Role of National Parliaments in the European Union, available at: <http://www.parliament.uk/documents/Role-of-National-Parliaments.pdf>, para. 77.

⁶⁰ Senior European Experts Group, *submission of evidence*.

- Ensure ‘accurate, independent and objective research’ into the law reform or legislation that is needed before proposing action;⁶¹
 - Make the Impact Assessment Board entirely independent⁶² (boards currently comprise other Commission officials);
 - Consult more widely⁶³ and in greater detail;⁶⁴
 - Consider interactions between existing legislation and new proposals: similarly, in assessing the need for action, pay proper regard to both existing legislation, and legislation yet to be implemented;⁶⁵ and
 - Treat impact assessment as a first step, and only once it is completed, draft the legislative proposal (rather than the two happening simultaneously);⁶⁶
 - Carry out some form of impact assessments at different stages during the negotiating process, particularly if the final text is very different from the original proposal.⁶⁷
- 3.36 The Law Societies also called for greater scrutiny of the impact of measures after adoption, and a greater willingness to repeal legislation or to amend it.⁶⁸ Similarly, the Local Government Association (LGA) said that the EU should consider alternatives to legislation, and introduce time limits and review periods (‘sunset clauses’), to accelerate the repeal and simplification of existing rules (the concept of ‘one-in, one-out’).⁶⁹
- 3.37 A number of legal practitioners and academics suggested that a potential benefit to greater procedural clarity on impact assessments would be that it could enable the ECJ to play a greater role in protecting subsidiarity, for example, De Baere, quoting Alan Dashwood’s evidence to the House of Commons European Scrutiny Committee: ‘The Court is at its strongest when the issue can be proceduralised in some way’, suggested that the ECJ could use impact assessment reports in combination with the duty to give reasons [...] to review the justification on the basis of subsidiarity and proportionality in a thorough and integrated manner.⁷⁰
- 3.38 Other commentators stressed the limited resources available to the European Commission for impact assessment; that, no matter how thorough a process is followed, there will always be some opposed to any given legislative proposal, and that the European Commission does not control the legislative process, which develops through negotiations in the Council and EP.⁷¹

⁶¹ Law Society and Law Society of Scotland, *submission of evidence*.

⁶² CEPS, *submission of evidence*.

⁶³ *Idem*.

⁶⁴ Law Society and Law Society of Scotland, *submission of evidence*.

⁶⁵ *Ibid* and CEPS, *submission of evidence*.

⁶⁶ *Idem*.

⁶⁷ *Idem*.

⁶⁸ For example multiple definitions of the same concept, such as “consumer” (See further explanation in the Joint Response of the Law Societies to *The Balance of Competences between the UK and the EU: Competition and Consumer Policy*)

⁶⁹ Local Government Association, *submission of evidence*.

⁷⁰ De Baere, *submission of evidence*.

⁷¹ *Record of 22 May 2014 stakeholder event, Dublin*.

D. Future Options for Article 352

- 3.39 In general contributors believed that Article 352 was likely to be of limited importance in the future, as a residual provision hedged about with multiple restrictions, mostly used to fill small, unforeseen gaps, and to amend existing legislation. One contributor suggested that, to strengthen democratic safeguards at the national level, all Member States should follow the German (and UK) example and require parliamentary authorization before governments vote on an Article 352 measure in the Council.⁷²
- 3.40 Others wondered if Article 352 might remain an option for more wide-ranging measures, particularly related to the economy. One commentator considered whether it could be used to integrate the European Stability Mechanism (ESM) into the EU legal order.⁷³ The ESM was established by an intergovernmental treaty among participating Member States, largely outside the EU framework but with reference to Article 136(3) TFEU. The ECJ did not answer this in the *Pringle* ruling, although the Commission said it was not excluded, although ‘it would not necessarily be less cumbersome’ than amending the Treaties, which would allow more options.⁷⁴

E: Broader Proposals and Further Future Challenges

A Forum for National Parliaments in the EU

- 3.41 Charles Grant of the Centre for European Reform has revived the idea of a parliamentary assembly which would bring together representatives of national parliaments, similar to the Parliamentary Assembly for the Council of Europe (a non-EU body).⁷⁵ He considers that this would help national parliamentarians to ‘think European’, as well as increasing their familiarity with how the EU works, whilst bringing to bear their increased democratic legitimacy and closeness to the national environment. He envisages this as focusing on areas where the European Parliament has a limited role, and voting in Council is by unanimity. Initially through report writing, he assesses that this body could gather real powers and act as a check on the European Council.
- 3.42 Cooper notes that the idea of stronger direct involvement of national parliaments in EU processes is not new, citing a 1950s proposal for a two chamber EU parliamentary assembly, one house composed (like the current EP) of directly elected members, and the other house drawn from national parliaments.⁷⁶ This proposal was again put forward by then German Foreign Minister, Joschka Fischer, in 2000, with the aim of ‘provid[ing] a forum in which the political elites of the Member States could interact; helping to integrate national parliaments into the constitutional structure of the Union, and also helping to forge a Union-wide political community’.⁷⁷ The theme is also covered in the Voting Section of the Voting, Consular and Statistics Balance of Competences Report. And others consider that the subsidiarity early warning mechanism could provide the basis

⁷² Schütze, *submission of evidence*.

⁷³ De Baere, *submission of evidence*.

⁷⁴ *Thomas Pringle v Government of Ireland, Ireland and The Attorney General*, Case C-370/12 [2012] ECR – 00000. Available at: <http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0370&lang1=en&type=TXT&ancre=>

⁷⁵ Charles Grant, ‘Can national parliaments make the EU more legitimate?’ *Centre for European Reform*, (10 June 2013)

⁷⁶ See Ian Cooper, ‘A ‘Virtual Third Chamber’ for the European Union? National Parliaments after the Treaty of Lisbon,’ *West European Politics*, (2012) 35:3,441-465 and Ian Cooper, ‘Bicameral or Tricameral? National Parliaments and Representative Democracy in the European Union,’ *Journal of European Integration* (2013) 35:5, 531-546

⁷⁷ Barber, *submission of evidence*.

for national parliaments to act as a virtual second chamber.⁷⁸ As a related suggestion, the European Scrutiny Committee has repeatedly called for the European Commission to include its full subsidiarity assessment in the Explanatory Memorandum which accompanies all EU proposals, and is produced in all official languages, unlike the Impact Assessment, which is not.

Greater Engagement among National Governments and National Parliaments

- 3.43 A number of submissions called for greater engagement between the UK and other national governments, and between the UK Parliament and its counterparts. In some cases, the emphasis was on the tone of engagement, preferring a more constructive/positive engagement.⁷⁹ The importance of timely engagement was also highlighted by a number of contributors, as it was generally considered more effective to influence proposals early.⁸⁰ There was also considerable discussion of resourcing which some suggested should be commensurate with the UK's status as a large Member State, including calling for a greater number of Brussels-based staff of the Parliamentary Scrutiny Committees to support early warning of important and/or difficult proposals.⁸¹ Business said it would welcome more *proactive* consultation by the UK Parliament on EU legislation.⁸² The House of Commons European Scrutiny Committee, for its part, has called on the UK Government to give more detail in its 'explanatory memoranda' which accompany EU documents deposited for scrutiny, and to provide these in a more timely fashion, to help it play its role, noting that the Government has more officials and greater familiarity with the detail of each dossier.⁸³ And greater Parliamentary access to documents was also called for by some.⁸⁴
- 3.44 It has been suggested by some members of national parliaments that further co-ordination among national parliaments could result in more 'yellow cards', by sharing information and analysis, and filtering or prioritising proposals. For example, the lower house of the Dutch Parliament in its May 2014 report on democratic legitimacy in the EU suggested that 'parliaments should agree, in the inter-parliamentary cooperation, to consider together, in good time, those legislative proposals that on the basis of a first appraisal are considered to be priorities and that qualify for a subsidiarity test. This could be based, for example, on joint coordination of responses to consultation documents, if the parliaments can already make a first appraisal of green and white papers during this drafting phase'.⁸⁵

⁷⁸ *Idem.*

⁷⁹ See for example CBI, *submission of evidence*, which called for more alliance-building. See also *Record of 27 June 2014 stakeholder event, Emerging Themes* and Senior European Experts Group, *submission of evidence*.

⁸⁰ Senior European Experts Group, *submission of evidence*; *Record of 22 May 2014 stakeholder event Dublin*.

⁸¹ *Record of 27 June 2014 stakeholder event, Emerging Themes.*, Brussels and Europe Liberal Democrats, *submission of evidence*; *Senior European Experts Group, submission of evidence* – pointing out that the Bundestag Liaison Office has around 30 staff.

⁸² See for example, British Telecom, *submission of evidence*.

⁸³ For further information on the position of the House of Commons European Scrutiny Committee 2013-14 24th Report on *Reforming European Scrutiny System in the House of Commons*, (2014) particularly paragraphs 52-54. Available at: www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/109/10906.htm

⁸⁴ *Record of 22 May 2014 stakeholder event Dublin*.

⁸⁵ Available at: www.tweedekamer.nl/images/Ahead_in_Europe_181-238660.pdf

3.45 Whilst the idea has previously been rejected, it was pointed out that aligning EU member states' electoral cycles would facilitate domestic parliaments' involvement in EU and national policy-making by freeing up time from 'pre-election posturing' as this would be limited to a set period (final year) of the legislatures. Parliaments would be better able to spend the previous 3-4 years working with other parliaments, and with the EU level institutions.⁸⁶

Changes to Parliamentary Scrutiny of EU Business

3.46 Evidence expressed a range of views on the advantages and disadvantages of thematic scrutiny committees, which consider EU business as an integral or mainstreamed part of overall business, or specialised EU scrutiny committees, as in the UK. Thematic committees in the Welsh Assembly were considered to work well, as does mainstreaming in the Irish Oireachtas (parliament).⁸⁷ It was commented that representatives to COSAC were often drawn from specialised EU committees, and unable to engage on the substance of specific proposals.⁸⁸

3.47 UK parliamentarians commented that the scrutiny system in the UK was little changed since the UK joined the EU, despite the growing volume and complexity of EU legislation.⁸⁹ The Electoral Reform Society cites a 2013 EU study of scrutiny methods, which describes Britain's system as a 'government accountability system', in which scrutiny is relatively developed when it comes to scrutiny of the Government's position once proposals have emerged, but is less developed when it comes to early scrutiny of Government policy approaches prior to the publication of proposals.⁹⁰ It concluded that the Danish system of 'Full Europeanisation' provides the largest amount of scrutiny and accountability, both before and after Council meetings, in plenary and committee sessions. It is based on a mandate system, whereby the European Affairs Committee must approve Ministers' proposed negotiating position. The UK Government's July 2014 response to the House of Commons European Scrutiny Committee's report stresses that the UK's approach to scrutiny is 'open and transparent', and that if the reforms to national parliament involvement which it supports were 'agreed and implemented, the Government believes that a system would be in place which would meet the goal the Committee is seeking to achieve in a truly effective way: giving national parliaments a decisive role in policing the acceptable limits of EU legislation'.⁹¹

⁸⁶ Garcia, *submission of evidence*.

⁸⁷ *Record of 27 June 2014 stakeholder event, Emerging Themes*.

⁸⁸ *Record of 29 April 2014 stakeholder event, Brussels*.

⁸⁹ Hansard Society, *Measured or Makeshift? Parliamentary Scrutiny of the European Union* (2013). Available at: www.hansardsociety.org.uk/wp-content/uploads/2013/10/Measured-or-Makeshift-Parliamentary-scrutiny-of-the-European-Union.pdf, accessed on 27 November 2014.

⁹⁰ European Parliament, *Democratic Control in the Member States of the European Council and the Euro zone summits* (2013). Available at: [www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474392/IPOL-AFCO_ET\(2013\)474392_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474392/IPOL-AFCO_ET(2013)474392_EN.pdf), accessed on 27 November 2014.

⁹¹ Government Response to the House of Commons European Scrutiny Committee Report HC 109-1 of Session 2013-14 *Reforming the Scrutiny System in the House of Commons* (2014). Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/335236/42260_Cm_8914_Government_Scrutiny_Response_-_FINAL.pdf, accessed on 27 November 2014.

Wider Suggestions to Enhance Democratic Legitimacy and Respect for Subsidiarity and Proportionality

- 3.48 Many see subsidiarity and proportionality as components in a wider re-examination of how and when the EU should act. More far-reaching reforms rethinking the articulation and enforcement of EU competences are discussed in the literature and political debates. One idea is, for example, the creation of a ‘competence scrutiny panel’ at EU level (to include representatives of the national parliaments) charged with independently reporting to the Council and European Parliament on compliance of all Commission proposals with the general scheme of EU competence. A ‘competence court’ (drawing upon judges from the EU courts as well as the national supreme courts) to deal specifically with competence and subsidiarity disputes has also been proposed (though this already much-voiced proposal would raise difficult questions about the division of jurisdiction between any new judicial body and the ECJ).⁹²
- 3.49 The Electoral Reform Society had a number of proposals to increase citizen involvement in EU law-making, building on the Lisbon Treaty’s innovation of the European Citizens Initiative which allows one million citizens in seven of the EU’s 28 Member States to propose EU policies.⁹³ It suggested pilots of mechanisms such as citizens’ juries and citizens’ assemblies to allow for institutionalised forms of deliberative democracy. Such participatory mechanisms would work through particularly controversial or hot EU topics, by taking a representative sample of citizens, informing them of the issues, perhaps through a series of presentations and then allowing them to discuss and deliberate on the issues, in an attempt to come to a consensus. The Electoral Reform Society (ERS) believes that such mechanisms can help to instil trust in a decision by demonstrating that normal citizens, rather than elites, can buy into it. The ERS’s view is that ‘power should broadly lie where people feel it is appropriate. Power should be negotiated between different levels of representation more. We should aim to create a multi-level EU with more input from below the EU structures in Brussels and member state governments’.⁹⁴
- 3.50 Professor Damian Chalmers set out a number of proposals which he believed would increase democratic self-government in Europe, transferring power from governments to parliaments, and away from the EU institutions to the national level:⁹⁵
- The EU would only act if its proposals passed a new test of democratic authority;
 - Proposals would be abandoned unless two thirds of national parliaments consented to their going forward;
 - The Commission would be required to review existing or propose new legislation if one third of national parliaments so request;
 - Individual national parliaments would be able to pass laws disapplying EU law where an independent study showed EU law imposed higher costs than benefits for that Member State; and
 - Citizens would have the right to petition a national Constitutional Court to disapply an EU law if the law violated certain domestic democratic values and traditions.

⁹² Dougan and Horsley, *submission of evidence*.

⁹³ HMG, *The Balance of Competences between the UK and the EU: Voting, Consular & Statistics* (2014).

⁹⁴ Electoral Reform Society, *submission of evidence*.

⁹⁵ Damian Chalmers, *Democratic Self-Government in the EU*, (May 2013). Available at: www.policy-network.net/publications/4399/democratic-self-government-in-europe, accessed on 27 November 2014.

3.51 Other suggestions seeking to improve democratic control of the EU were made by Ben Gummer MP including:

- transferring the right of initiative from the Commission to elected national leaders. ‘If it were clear that it was the prime minister, with his colleagues in the Council, who was initiating European-wide legislation, not an unelected Commission, the line of power and accountability would immediately become more clear. Poor legislation would become his responsibility, therefore, and he would be held accountable for it’.⁹⁶
- Changing European Parliament representation, perhaps by restoring dual mandates and sending national parliamentarians. ‘[W]e should stop the pretence of a single European demos. Member States should be free to decide who, how and when they send representatives to the European Parliament to scrutinize legislation on their constituents’ behalf. Were Vicky Ford a member of the UK Parliament but delegated to go to Brussels, on a dual mandate as it used to be, I can guarantee she would find greater recognition for her efforts there on behalf of her constituents in the east of England’.⁹⁷

More Future Challenges:

Enhanced Cooperation

3.52 Hunt notes the need to address the complications caused by ‘variable geometry’ which in an increasing number of areas means that EU laws will not apply in whole or in part to all Member States. He considers it may be problematic to assess subsidiarity compliance of such measures, with particular difficulties in determining the necessity and value added of measures when only some Member States will be covered by the resultant legislation.⁹⁸ He suggests there may be a case to treat the group of states who will participate in enhanced cooperation as ‘the EU’ (rather than a mid-way group between no EU intervention and a whole-EU approach) when assessing subsidiarity.⁹⁹

External Competence

3.53 Garcia highlights the need to consider subsidiarity when looking at the EU’s external competence, particularly when concluding ambitious free trade agreements with other countries, as the EU’s external competence may be greater than its internal competence, and will provide a back door to extend that, which will also affect subsidiarity as, in order to fully participate in the international negotiations and the implementing bodies created by international agreements, more action will be required at the EU level. She argues that the introduction of a new level of governance through international trade and other agreements may lead to decisions taken at levels even further removed from citizens, and to institutional arrangements which may in turn be more challenging to control at lower levels of governance.¹⁰⁰

⁹⁶ Ben Gummer MP, in *European Mainstream; In Our Interest: Britain with Europe* p43,. Available at: www.kas.de/wf/doc/kas_37142-1522-1-30.pdf?140317164953

⁹⁷ Idem.

⁹⁸ House of Lords, *Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office* (2013). Available at: www.ipex.eu/IPEXL-WEB/scrutiny/APP20130255/uklor.do, accessed on 27 November 2014.

⁹⁹ Hunt, *submission of evidence*.

¹⁰⁰ Garcia, *submission of evidence*.

Changes to UK Approach

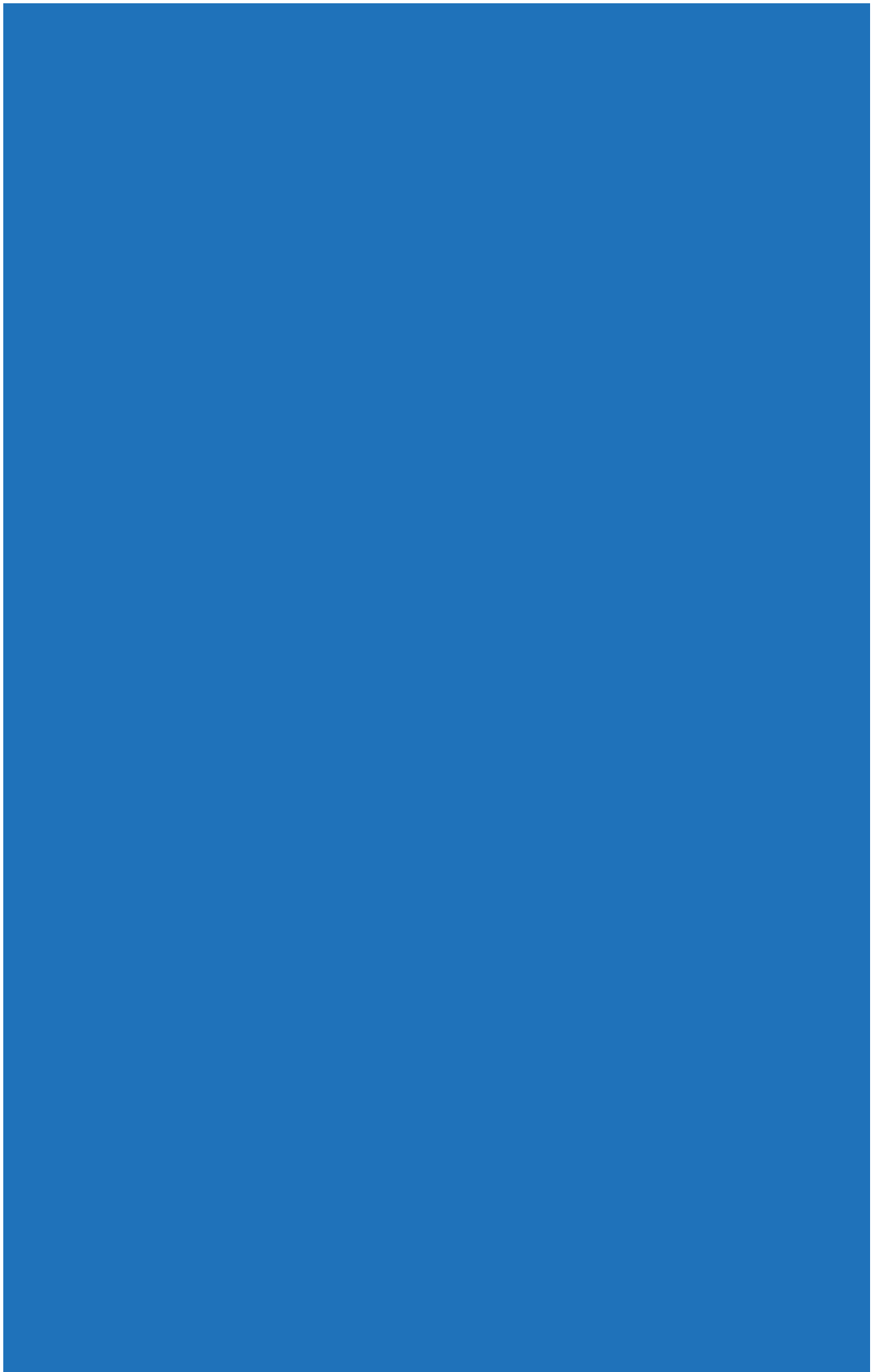
- 3.54 Evidence received from academics, and bodies in Scotland and Wales, and the Local Government Association emphasised the importance of adequate structures, processes and time frames to ensure adequate consultation of devolved administrations and assemblies, as well as local authorities, within the UK on EU proposals.¹⁰¹
- 3.55 CIVITAS argued for changes to UK law, to clarify parliamentary supremacy, on the grounds that this would solve the questions of subsidiarity and proportionality as the national government would always have the final say on whether or not to implement the EU legislation in question.¹⁰² This would not be consistent with the obligations of the UK under the EU treaties.

Looking Ahead

- 3.56 As this section demonstrates, this is a wide ranging debate that goes to the heart of democratic accountability and better regulation in the EU. The new European Commission took office on 1 November 2014, with a number of structural changes including the creation of a First Vice-President role with particular responsibility for considering respect for subsidiarity and proportionality before any new legislative proposals are tabled. This suggests that there will be a firmer focus on these issues within the 2014-2019 Commission, and the opportunity for greater engagement with the concerns and proposals of Member States and national parliaments.

¹⁰¹ Welsh Government, Scottish Government, Joanne Hunt, *evidence*, National Assembly for Wales *evidence*, LGA *evidence*,

¹⁰² CIVITAS, *submission of evidence*



Annex A: Submissions to the Call for Evidence

(1) Submissions to the Call for Evidence

Austrian Federal Economic Chamber

Barber, Nick

Brussels and Europe Liberal Democrats

Business for New Europe

BT

CBI

CIVITAS

Cooper, Ian, University of Oslo

COSLA

De Baere, Geert (Professor), University of Leuven

Dougan, Michael (Professor), and Horsley, Thomas (Dr), University of Liverpool

Electoral Reform Society

Emerson, Michael Centre for European Policy Studies (CEPS)

European Commission

Vilnius EU Speakers' Conference (2 x pieces of evidence: official summary and note by HMA Vilnius)

Garcia, Maria (Dr), University of Bath, Horsley, Thomas (Dr), University of Liverpool

House of Lords, EU Committee

Hunt, Joanne (Dr), Cardiff Law School

Kamall, Syed, MEP

Konstadinides, Theodore (Dr), University of Sussex

Ladefoged, Anders, Confederation of Danish Industry

Law Society

Law Society of Scotland

Local Government Association

McDonagh, Luke (Dr), Cardiff University

National Assembly for Wales

Niglia, Leone (Professor), University of Exeter

NATS

Palmer, Robert, Monckton Chambers
Schütze, Robert (Professor), Durham University
Scottish Government
Senior European Experts Group
Tannock, Charles, MEP
Tridimas, Takis, Queen Mary University of London
Ulgen, Ozlem (Dr), Birmingham City University
Welsh Government
Wildlife and Countryside Link
Wyatt, Derrick, (Professor), Oxford University

[\(2\) Evidence Submitted to Previous Semesters Containing References to Subsidiarity, Proportionality and Article 352](#)

Semester 1: Single Market Report:

Austrian Federal Economic Chamber
British American Business
British Banking Association
British Influence
British Retail Consortium
The City UK
CBI
Dougan, Michael (Professor)
Liberal Democratic Party
Open Europe
The Fresh Start Project
The Law Society +
Scottish Whisky Association
Senior European Experts Group

Semester 1: Taxation Report:

British Bankers Association
Chartered Institute of Taxation
Oxford University Centre for Business Taxation

Semester 1: Animal Health and Welfare and Food Report;

Animal Health and Welfare Workshop, 29 February 2013
Brussels and UK Liberal Democrats
Country Land and Business Association

Semester 1: Health Report:

Alliance for Natural Health International
Association of Directors of Public Health
British American Tobacco
BMA

Electronic Cigarette Industry Trade Association
Fire Sector Federation
Hanover Associates
House of Commons European Scrutiny Committee
Liberal Democratic Parliamentary Political Committee
North of England EU Health Partnership
Royal College of Physicians and Surgeons of Glasgow
Scottish Whisky Association
Taylor, Rebecca, MEP

Semester 2: Environment and Climate Change Report:

Institute for European Environmental Policy
RSPB
Senior European Experts Group
School of Environmental Sciences, University of East Anglia

Semester 2: Free Movement of Goods Report:

Law Society of England and Wales
Liverpool European Law Unit, Liverpool Law School

Semester 2: Research and Development Report:

Research Councils UK

Semester 2: Tourism, Culture and Sport Report

British Council

Semester 2: Trade and Investment Report:

Senior European Experts Group

Semester 2: Transport Bennion, Phil, MEP

Chartered Institute of Logistics and Transport
Civil Aviation Authority
Convention of Scottish Local Authorities
Department of Transport Workshops
Eurostar
RAC
Rail Workshop
The Society of Motor Manufacturers and Traders
UK Airport Operators' Association

Semester 3: Agriculture Report:

Agricultural Biotechnology Council
Cardwell, Michael (Professor), University of Leeds
COSLA
Forestry Commission
Rural Payments Agency

Semester 3: Cohesion Report:

LSE

Semester 3: Competition and Consumer Policy:

Advertising Agency

The Bar Council

BEUC, The European Consumer Organisation

British Chambers of Commerce

Hornsby, Stephen

Joint Law Society

Semester 3: Energy:

AB Sugar

Chartered Institution of Building Services Engineers

Chichester, Giles and Ford, Vicky on behalf of Conservative MEPs

EDF Energy

Energy UK

E.On

Mineral Products Association

National Grid

Note of Brussels workshop, 3 December 2013

Note of London workshop, 14 November 2013

Scottish Government

TradeVick Limited

Semester 3: Single Market – Financial Services and Free Movement of Capital

Association of Corporate Treasurers

Association of Foreign Banks

The Association of Professional Financial Advisors

Bar Council of England and Wales

British Insurance Brokers' Association

British Private Equity and Venture Capital Association

BBA

British Chamber of Commerce for Luxembourg

Building Societies' Association

CBI

City of London Law Society

Crown Dependencies

FCA Smaller Business Practitioner Panel

Lord Flight

Bank of America Merrill Lynch

Payments Council
RBS
Royal and Sun Alliance
Wealth Management Association

Semester 3: Single Market: Free Movement of Services:

Advertising Association
COSLA
The Institute of Chartered Accountants in England and Wales
The Law Society
Local Government Association
Three

Semester 3: Social and Employment:

Bar Council
Bennion, Phil, MEP
British Ceramic Confederation
Bruges Group
CBI
CEEP
Client Earth
COSLA
Discrimination Law Association
Federation of Small Businesses
Foreign Policy Centre
The Institute of Directors
The Law Society
McIntyre, Anthea, MEP
National Farmers' Union
Scottish Fishermans' Federation
Scottish Government
Silkin, Lewis
TUC

Semester 4 reports were prepared concurrently with this one.

Annex B: Engagement Events

Brussels 29 April 2014

Doris Spickenreuther, Committee of the Regions
Petra Candellier, Committee of the Regions
Claire Montgomery, Scottish Government
Ian Catlow, London's European Office
Leonie Hertel, Convention of Scottish Local Authorities
Haris Kountouros, DG Presidency
Serge Thines, DIAGEO
Robert Bray, DG Internal Policies, European Parliament
Serafin Pazos-Vidal, Convention of Scottish Local Authorities
Bob Rayner, DIAGEO
Evanna Fruithof, Bar Council of England and Wales
Robert Kaye, Law Society
Sietse Wijnsma, Office of Andrew Duff MEP
Burt Kuby, Committee of the Regions

FCO Legal Seminar, 7 May 2014

Professor Catherine Barnard, Cambridge University
Professor Paul Craig, Oxford University
Professor Adam Cygan, Leicester University
Professor Sir Alan Dashwood QC
Professor Michael Dougan, Liverpool University
Miha Erman, Seconded to FCO from Slovenia
Dr Thomas Horsley, Liverpool University
Dr Theodore Konstadinides, University of Surrey
Thomas de la Mare QC, Blackstone Chambers
Robert Palmer, Monckton Chambers
Professor Stephen Peers, University of Essex
The Right Hon Sir Konrad Schiemann (Judge, European Court of Justice, retired)
Professor Eleanor Spaventa, Durham University
Professor Derrick Wyatt, University of Oxford

Bath 13 May 2014

Professor David Galbreath, University of Bath
 Dr Susan Milner, University of Bath
 Dr Joanne Hunt, University of Cardiff
 Professor Andrew Massey, University of Exeter
 Patrick Giles, NATS
 Professor Charles Lee, University of Bath
 Dr Ozlem Uglen, Birmingham City University
 Dr Luke McDonagh, University of Cardiff
 Dr Nathaniel Copsey, University of Aston
 Dr Theodoros Papadopoulos, University of Bath
 Dr Phil Syrpis, University of Bristol
 Dr Leone Niglia, University of Exeter

Dublin, 22 May 2014

James Kilcourse, Institute for International and European Affairs (IIEA)
 Linda Barry, IIEA
 Dermot Scott (no affiliation, formerly European Parliament)
 Katherine Meenan, IIEA

Vienna 13 June 2014

Karl Duffek, Director of Renner Insitute (SPÖ)
 Prof. Dr Melanie Sully, Go-Governance NGO

Copenhagen 25 June 2014

Eva Kjer, MP, the Liberal Party.
 Uffe Østergaard, professor at Copenhagen Business School.
 Sine Nørholm Just, associated professor at Copenhagen Business School.
 Flemming Elbæk, senior consultant at the Danish Agriculture and Food Council
 Torsten Hasforth, chief consultant, Danish Energy Association.

Emerging Themes Workshop, 27 June 2014

European Foundation
 Council of British Chambers of Commerce in Europe
 Business for Britain
 Anthony Cary (FCO Alumni)
 European Commission
 Heathrow Airport
 Gapuma
 EnergyUK
 TheCityUK

Annex C: Other Sources Used for the Review

Centre for European Policy Studies, *Shifting EU Institutional Reform into High Gear* (2014).

Centre for European Reform, Grant, Charles, *Can National Parliaments Make the EU More Legitimate?* (2013).

Christiansen, T., Högenauer, A., Neuhold, C., *National Parliaments in the Post-Lisbon European Union: Bureaucratization Rather Than Democratization?* (2012).

Cooper, I., *Bicameral or Tricameral? National Parliaments and Representative Democracy in the European Union* (2013).

Cooper, I., *A 'Virtual Third Chamber' for the European Union? National Parliaments after the Treaty of Lisbon* (2012).

De Wilde, P., *Why the Early Warning Mechanism does Not Alleviate the Democratic Deficit* (2012).

Fresh Start Project, *Mandate for Reform, Securing the Right Deal for the UK. Equipping the EU for a Globalised World* (2013).

House of Lords, European Union Committee, *The Role of National Parliaments in the European Union* (2014).

Open Europe, *The Case for European Localism* (2011).

Green, *Subsidiarity and the European Union: Beyond the Ideological Impasse* (2002).

CEPS Piedrafita, Sonia *EU Democratic Legitimacy and National Parliaments* (2013).

CER, Menon, Anand and Peet, John *Beyond the European Parliament: Rethinking the EU's democratic legitimacy* (2010).

House of Commons research note SN/IA/6297, *National Parliaments and EU law-making: how is the 'yellow card' system working?* (2012).

House of Commons Library, *How much legislation comes from Europe?*, Research Paper 10/62 (2010).

Danish Parliament European Affairs Committee, *Recommendations for changing the role of National Parliaments in a changing European Governance* (2014).

CEPS, *Shifting EU Institutional Reform into High Gear, Report of the High-Level Group* (2014).

Sauter, Wolfe, *Proportionality in EU law – a balancing act* (2013)

[Cambridge Yearbook of European Legal Studies, Vol 15 \(2012-2013\)](#).

CER, Grant, Charles, *How to Build a Modern European Union* (2013).

CEPS, *Shifting EU Institutional Reform into High Gear* (2014).

House of Lords EU Committee, *Impact Assessments in the EU: room for improvement* (2010).

Hansard Society, *Measured or Makeshift? Parliamentary Scrutiny of the European Union* (2013).

Appendix A: Further Evidence from other Balance of Competence Reports

(1) Further Examples of Subsidiarity from other Balance of Competence Reports

HMG Review of the Balance of Competences between the UK and the EU: Agriculture

- ‘... [S]takeholders argued from a localist perspective that rural development policy did not need to be managed at the EU level. Professor Harald Grethe argued that most non-environmental rural development measures ‘are of a rather local nature regarding their effects and the problems they address’, and the preferences of Member States vary quite considerably, so there is no need for the policy to be centralised.’ [Paragraph 2.96] For example, the Dutch subsidiarity review concluded that ‘forestry policy was primarily a matter for national governments.’ ‘... [i]f any proposals were put forward they would probably be rejected on the grounds of subsidiarity.’ [Paragraph 2.108]

HMG Review of the Balance of Competences between the UK and the EU: Cohesion Policy

- ‘... [F]or wealthier Member States, the recycling of money via Brussels not only within the same country but often within the same region was [considered] ineffective and costly. Redistribution of resources within a Member State could be done without EU involvement, consistent with the principle of subsidiarity.’ [Paragraph 3.55]
- The question of what is the most appropriate geographical level for activity is relevant to other EU funds. The House of Commons and the House of Lords have doubted whether aid for the most deprived people should be supported at EU level, believing this is most appropriately dealt with at national or regional level. Both Houses issued reasoned opinions under the ‘yellow card’ procedure introduced by the Lisbon Treaty. The UK Government voted against the regulation in March 2013 and issued a statement to be added to the minutes of the Council meeting, setting out its belief that the Fund for Aid to the Most Deprived was inconsistent with the principle of subsidiarity and that support for social inclusion should be delivered through the [European Social Fund] ESF rather the creation of a new fund. The Welsh Government too, while believing that structural funds should continue to support regions with the weakest economic base regardless of the wealth of the Member State, believed that initiatives such as the Fund for Aid to The Most Deprived as well as the Youth Employment Initiative were ill-conceived as EU interventions and better suited to regional development, control and deployment.’ [Paragraph 3.69]

HMG Review of the Balance of Competences between the UK and the EU: Energy Report

- ‘Those stakeholders representing the upstream sector (oil and gas production companies) felt that some EU action had tended to encroach into areas that were Member State competences and where they regarded EU action as unnecessary and inappropriate. This was the case particularly as regards legislation affecting North Sea activities production. Stakeholders felt that world class systems were already in place for exploiting oil and gas reserves and they were already subject to a raft of safety legislation.’ [Paragraph 2.3.16].
- ‘Some stakeholders found it unhelpful that the EU continued to try to extend its competence in this sector through the route of safety and security legislation – they regarded this as an area that has already been sufficiently legislated for. Stakeholders also took issue with the EU introducing new legislation when existing legislation has been barely implemented, for example the proposed amendments to the Nuclear Safety Directive.’ [Paragraph 2.6.16]

HMG Review of the Balance of Competences between the UK and the EU: The Single Market: Financial Services and the Free Movement of Capital

- ‘The General Council of the Bar of England and Wales (the ‘Bar Council’) commented that, ‘EU legislation since the 2008 crisis has tended increasingly to encroach on Member States’ competences, and towards prescriptive, centralised decision making. This gives rise to cause for significant concerns about subsidiarity and the balance of competences, as well as legal basis and institutional balance’. It cited as examples the powers of the [European Supervisory Authorities] ESAs to take decisions binding on national competent authorities, in particular the power of the [European Securities and Markets Authority] ESMA ‘to prohibit, impose conditions on, or require disclosure of, short positions’ held on UK markets as part of the Short Selling Regulation.’ [Paragraph 3.147].

(2) Further Examples of Proportionality from other Balance of Competence Reports

HMG Review of the Balance of Competences between the UK and the EU: Agriculture

Genetically Modified (GM) Crops

- GM crops is an example where there is movement in the direction of greater flexibility. Improvements are being sought/discussed ‘which should allow those Member States that wish to opt out of GM cultivation to do so, while allowing others like the UK Government to accept GM crops.’ [Paragraph 2.134]

HMG Review of the Balance of Competences between the UK and the EU: Competition and Consumer Policy Report

Consumer Protection

- As consumer policy is a shared EU competence in those areas where harmonisation of EU legislation is placed at a minimum level, the UK has legislated beyond it. This type of flexibility in making law allows for the retention of particularities of Member States social, cultural and economic conditions. For example, consumers in the UK enjoy the short term right to reject a faulty product; this remedy is only available in a few Member States’ national laws and is a rule which the UK is keen to preserve.’ [Paragraph 4.36]

- The Office of Fair Trading and Competition Commission said: ‘In our view [...] national laws can have a crucial, complementary role to play in safeguarding consumers in Member States given the range of different market conditions and laws across Member States [...] We recognise that maximum harmonisation may be appropriate in certain cases but its use in consumer protection legislation should be considered very carefully, taking greater account of local levels of existing consumer protection, and where maximum harmonisation is used the drafting process at EU level must be more robust’. [Paragraph 3.83]

HMG Review of the Balance of Competences between the UK and the EU: Energy Report

Energy Efficiency Legislation

- A number of respondents considered that other EU energy efficiency legislation was overly prescriptive which meant that requirements were not always cost-effective. [Executive Summary, page 9] ‘[S]ome stakeholders felt that EU energy efficiency legislation had been too prescriptive and, in the workshop on energy efficiency, it was suggested that sometimes the EU had become too focused on harmonisation of measures and policy tools which were not always appropriate as national circumstances including climate and consumer attitudes, differed considerably between Member States.’ [Paragraph 2.4.28]
- ‘[A] number of stakeholders responded, both in workshop sessions and in written evidence, that the EU has a tendency to over harmonise and/or introduce new legislation – essentially as a ‘quick fix’ to solve a perceived problem rather than giving existing legislation a time to bed in and/or amend existing legislation. On this latter point stakeholders also regarded the process of amending existing EU legislation as too cumbersome and lengthy and in need of reform. In particular, when market conditions changed, some stakeholders felt there may be a need to accommodate new challenges or technologies. However a few stakeholders recognised that this could be difficult once EU legislation was already in place, given the time-consuming process to change legislation. Some stakeholders suggested that having more flexible legislation in the first place would allow Member States to adapt as appropriate.’ [Paragraph 2.1.46]

HMG Review of the Balance of Competences between the UK and the EU: The Single Market: Financial Services and the Free Movement of Capital

Rate of financial services legislation leading to poor quality, disproportionate legislation

- ‘The shift in focus from market-opening to financial stability in the last five years has raised questions regarding the quality of the policy-making process and the resulting rules. Although there was broad consensus about the need for EU-level rules to underpin the single market in financial services [and to have a financial stability objective in the wake of the crisis], evidence from stakeholders raised significant concerns regarding the recent pace, volume and focus of EU legislation, the failure to differentiate between different financial services sectors, the lack of proportionality, and insufficient recognition of the subsidiarity principle, especially in the retail sector.’ [Executive Summary, page 7] Exemplifying this:

[The British Insurance Brokers' Association] BIBA listed around 20 areas of EU rule-making that impact on its members, and added that, 'This is a staggering volume of new regulation to put on a sector over the course of a few years. We therefore strongly feel that the right level has NOT been achieved'. In addition, the [Wealth Management Association] WMA cited a report published by KPMG that 'wealth management firms spend between 10%-20% of their turnover on regulation', and that for some firms this represents 'up to 50% of profits'. [Paragraph 3.152]

- The EU's observance of the principles of subsidiarity and proportionality in financial services legislation attracted far more criticism than praise. A general concern was voiced by the City of London Law Society (CLLS) with respect to the need to look beyond individual pieces of legislation in order to gauge the full impact: 'there has been little or no attempt to assess the cumulative impact of the full range of European legislative initiatives on the entities that are subject to them. This makes any true assessment of proportionality very difficult'. [Paragraph 3.146] 'For the balance to be fully appropriate in the future, the EU should undertake significant reform of the existing EU policy-making framework and processes, take a more proportionate approach to legislation in all sub-sectors, and give greater consideration to the principle of subsidiarity in retail market sectors.' [Executive Summary, page 5]

Specific examples of disproportionate financial services legislation include:

Disproportionate Compared to International Standards

- 'Evidence also raised concerns that EU markets regulation was disproportionate in some areas compared to the global level, and argued that deviations from international standards can create scope for market fragmentation, regulatory arbitrage, weaken competitiveness with firms based in other countries, and contribute to challenges in agreeing terms of access between EU and non-EU countries. Stakeholders also highlighted the lack of policy coherence which can create barriers to firms conducting business internationally' [IRSG, Barclays] [Paragraph 3.57]
- '[E]vidence ... drew attention to measures in which the EU has not confined itself to following the specifics of international agreements and has departed from global standards.' [A] notable example is 'the Commission's proposed Regulation covering benchmarks and remuneration measures in [Capital Requirements Directive IV] CRD IV' which are significantly more stringent than international best practice as set out in the Financial Stability Board Principles for Sound Compensation Practices. 'Other aspects of CRD IV have also attracted criticism from third parties for inconsistency with the international standards as set by the [Basel Committee on Banking Supervision] BCBS. [European Systemic Risk Board Opinion] [Paragraph 3.56]

Third Country Access

- 'Traditionally, EU law allowed each Member State to decide whether, and on what terms, firms from third countries could access its markets.' [Paragraph 3.89] 'However, since the financial crisis, there has been a shift in the Commission's policy from allowing each Member State to determine for itself the level of access for Third Country firms to enforcing a common approach based on the principles of equivalence and reciprocity.' [Paragraph 3.90] 'Evidence emphasised strong concerns that a 'one-size-fits-all' approach, which relies on strict or 'line-by-line' equivalence whereby the rules in other jurisdictions need to be effectively identical to the EU's rules, could create tensions with Third Countries, including key emerging markets, increase uncertainty and inhibit competitiveness for firms, and be damaging to the interests of end-users and consumers in all Member States, given that this approach does not take account of sectoral nuances.' [British Private Equity & Venture Capital Association] [Paragraph 3.91]

- The majority of responses ‘called for the greater use of mutual recognition and ‘substituted compliance’ with a focus on equivalent, but not identical, regulatory and supervisory outcomes. In other words, that the EU should rely more on Third Country laws, instead of EU requirements, where the outcomes are broadly the same.’ [Confederation of British Industry] [Paragraph 3.92]

HMG Review of the Balance of Competences between the UK and the EU: Fundamental Rights

- In the Test-Achats case the European Court of Justice (ECJ) ruled that a provision allowing insurance companies to charge different premiums for men and women in an EU Directive agreed by the EU legislative institutions was incompatible with the EU Treaties.
- Anthony Speight QC argued that the ECJ brought into force a law which the democratic organs of the EU manifestly did not want to enact. He commented that, irrespective of whether one agrees with the policy in question, the judgment of the ECJ:
- ‘Represents a remarkable inroad on the principle of the democratic competence of the legislative institutions of the EU. It is little exaggeration to say that it amounts to legislation by the Court.’ [Paragraphs 4.13-5]

HMG Review of the Balance of Competences between the UK and the EU: The Single Market: Free Movement of Services

- ‘In keeping with concerns over other EU procurement legislation, a common complaint was the bureaucratic costs of the Directive for procurers and suppliers alike. This was felt to impact substantially on SMEs [Small and Medium Sized Enterprises], who could be put off by the high costs involved in tendering. For example, one week of delay in a £1 million proposal could add £10,000 to total costs for each of the bidders.’ [Paragraph 3.55]
- ‘Service providers argued that they still face a whole range of other regulatory requirements, some of which can have a strong dissuasive effect. Business Europe points to the example of insurance, with some service providers obliged to take out insurance to provide services in another Member State, despite being adequately insured in their country of origin.’ [Paragraph 3.61]

HMG Review of the Balance of Competences between the UK and the EU: Social & Employment Policy

Working Time and Agency Workers Directives

- ‘EU competence to legislate on employment and health and safety at work issues is limited to the adoption of minimum requirements. [...] In theory this practice ensures that the EU respects the principles of subsidiarity and proportionality by ensuring that EU regulation is the minimum necessary and that it is for Member States to decide when it is necessary to go beyond the minimum. [...] a number of respondents felt that this was not working in practice.’
- ‘...some respondents argued that in some cases current EU rules go beyond the minimum required. For example, EEF [Engineering Employers’ Federation] said ‘all too often we believe this has been exceeded, and EU law imposed higher standards of compliance than the minimum requires. The WTD and the Posting of Workers Directive are but two examples, where we question whether EU law has provided only the minimum protection required.’ [Paragraphs 3.26-7]

- A number of respondents felt that EU legislation is too detailed and requirements imposed on the UK were too prescriptive and that the national interest would be better served if the EU focussed more on goals and outcomes. The Confederation of British Industry (CBI) said 'Prescriptive requirements can undermine the principle of subsidiarity by failing to recognise the diversity of models within the EU. Rather than attempting to impose aspects of one model on other Member States the focus should instead be on outcomes rather than process'. They pointed to the Working Time, Temporary Agency Workers and Artificial Optical Radiation directives as examples of prescriptive requirements that, in their view, undermine the principle of subsidiarity. [Paragraph 3.28]
- The CBI's view was that the AWD [Agency Workers Directive] was one of a number whose prescriptive requirements undermined the principle of subsidiarity. In the CBI's view the Directive was unnecessary and 'has cost the UK employers £1.9bn per year, largely in compliance cost and red tape'. [Paragraph 3.79]
- 'There was in particular a call for the EU to adopt a more proportionate approach to regulation of health and safety at work from a number of organisations including the CBI, FSB, EEF, British Ceramic Federation, and the National Farmers' Union (NFU). They compared unfavourably the EU's inflexible hazard-based system with the UK's more flexible, risk-based approach.
- The Prime Minister's Business Task force recommended that Member States should have the flexibility to determine when written risk assessments are required, in line with their national circumstances.' [Paragraph 3.35]
- While elements of the EU Health & Safety framework have adopted UK practices the framework directive also included elements of a more prescriptive nature. In particular it 'does not qualify the extent of the duties on the employer to seek a proportionate balance between cost and risk such as the UK system does through the So Far As Is Reasonably Practicable (SFAIRP) qualification in the 1974 Act. [Paragraph 2.18]

HMG Review of the Balance of Competences between the UK and the EU: Transport

- 'The Commission was urged by some stakeholders to legislate with a less heavy hand, or not at all, when it comes to non intra-European issues, and to allow greater scope to national handling when it comes to purely domestic issues and local circumstances. This concern was raised by stakeholders from the recreational aviation, rail and roads sectors. [Paragraph 3.27]

Appendix B: Glossary of Abbreviations and Acronyms

AIFMD	Alternative Investment Fund Managers Directive
BMA	British Medical Association
CEPS	Centre for European Policy Studies
CER	Centre for European Reform
CoR	Committee of the Regions
CAP	Common Agricultural Policy
CFP	Common Fisheries Policy
CBI	The Confederation of British Industry
COSAC	Conférence des Organes Spécialisés dans les Affaires Communautaires
COSLA	Convention of Scottish Local Authorities
ERS	Electoral Reform Society
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EESC	European Economic and Social Committee
ESM	European Stability Mechanism
ILO	International Labour Organisation
IMO	International Maritime Organisation
LGA	Local Government Association
MEP	Member of the European Parliament
NFU	National Farmers Union
QMV	Qualified Majority Voting
SME	Small and Medium sized Enterprises
TEC	Treaty Establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations